88-536

Supreme Court, U.S.
FILED
SEP 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO.

SUPREME COURT OF THE UNITED STATES

October Term 1988

BRANKA SCULLIN,

Petitioner,

vs.

MICHAEL MARSTEN,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of California for the Sixth Appellate District

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

PHILIPS B. PATTON
Attorney at Law
P. O. Box 5279
Santa Cruz CA 95063

(408) 438-3955

204 pp

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///

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MICHAEL MARSDEN [sic],

Plaintiff and Respondent

vs.

BARBARA SCULLEN [sic],

Defendant and Appellant.

No. H003153

(Santa Cruz County Super.Ct. No. 97871)

In a proceeding to enjoin harassment brought pursuant to Code of

Civil Procedure section 527.6,[1] the trial court rendered orders consistent with the relief sought and defendant Barbara Scullen [sic] appeals.[2] We affirm.

Plaintiff Michael Marsden [sic] resides on a private street near the ocean in Aptos. Access is obtained only by entering [1/2] Seacliff State Park

---

1/ All statutory references are to the Code of Civil Procedure.

2/ The notice of appeal states defendant "appeals from the ORDER AFTER HEARING ON PETITION FOR INJUCTION [sic - inserted by Court of Appeal] PROHIBITING HARRASSMENT [sic - inserted by Court of Appeal] entered herein on MAY 1, 1987." (The order was signed on May 1 [sic]; it was filed on May 5.) A portion of defendant's brief raises issues concerning an order in re contempt filed on April 21. We do not address these issues because defendant's notice of appeal does not specify that an appeal was taken from this order (Cal. Rules of Court, rule 1(a)) and because orders made in cases of contempt are not appealable (§§ 1222, 904.1).

and traveling past a parking lot, the state park office, and a second parking lot to a security gate. Plaintiff's home is the fourth from the gate and is within 1000 yards of the first parking lot.

Approximately seven and one-half years ago defendant worked in the neighborhood as a nurse and became attracted to plaintiff. She then embarked upon a pattern of unusual behavior. She surveyed and followed him; she attempted to communicate with him in public, by telephone, through the mail, and through his friends. This attention was unwanted and plaintiff

obtained an injunction in May 1986.[3]

On March 6, 1987, plaintiff filed an amended petition by which he sought to expand the scope of the previous order. Hearing was held and testimony heard. Since the scope of our review is the same as in the case of any other judgment or order, we apply the familiar substantial evidence test and view the testimony in the light most favorable to the prevailing party. (Monogram Industries, Inc. v. Sar Industries, Inc. (1976) 64 Cal.App.3d 692, 703.)

3/ A proceeding under section 527.6 is specially provided to enjoin "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff." The prescribed remedy is a personal injunction prohibiting the harassment.

Every day since the 1986 hearing, defendant would park her car in the park's first parking lot. She would stay within the [2/3] vehicle or walk outside not more than 30 or 40 feet away. She would then follow plaintiff on his daily trip to the Aptos Post Office and the Rancho Del Mar Shopping Center. She would personally approach within inches and try to talk to him. Defendant threatened plaintiff's girlfriend on at least one occasion during this period.

Defendant lives in Santa Cruz and receives her personal mail in a Santa Cruz post office box. She admitted frequenting the parking lot, post office, and shopping center hoping to see plaintiff. She also acknowledged talking to plaintiff's girlfriend because the girlfriend knew plaintiff.

Defendant's principal contentions concern that portion of the injunction prohibiting her from "contacting plaintiff's neighbors, housekeeper and friends."

She argues the order is void for vagueness and overbreadth because the wording appears to prohibit lawful as well as unlawful activity and because the forbidden group is undefined. We disagree.

An injunction is fashioned to meet the circumstances of a particular case and need not be judged by the same standards employed in determining the validity of a statute. (California Retail Liquor Dealers Institute v. United Farm Workers (1976) 57 Cal.App.3d 606, 610.) Because defendant's past conduct consisted of initiating social intercourse with persons known to be

acquainted with plaintiff, there is no danger of misinterpreting what behavior is prohibited by the challenged order.

This case is unlike Smith v. Silvey (1983) 149 Cal.App.3d [3/4] 400, 406-407. There, the defendant's past conduct consisted of petitioning the government for redress of grievances. Since this is constitutionally protected activity, the injunction prohibiting defendant from "contacting" residents was infirm for failing to differentiate between constitutionally protected contacts and harassing contacts.

Making unwanted indirect contact with someone through his friends and neighbors is not the exercising of one's right to free speech or association. It is harassment as defined in section 527.6, and it is the very activity prohibited by the injunction in this

case.

Defendant next objects to that portion of the injunction prohibiting her from being within the boundary of Seacliff State Park and from being at the Aptos Post Office or Rancho Del Mar Shopping Center after the hour of 10:30 a.m.. She contends the injunction forbids her from engaging in legitimate activity unrelated to plaintiff's presence.

This claim is without merit. The contention is abstractly true and therefore could be uttered about most injunctions issued under section 527.6.

The record in this case is crystal clear. It demonstrates that any legitimate reason for defendant's presence at the places described in the injunction takes a back seat to her primary purpose. The injunction is not

broadly prohibitive. There are many beaches to patronize in the Santa Cruz area. A post office and shopping center are not places where one ordinarily whiles away one's day. If defendant must travel from [4/5] Santa Cruz to Aptos on post office or shopping center business, the injunction permits her to complete her business by 10:30 a.m.. The limited prohibition is justified by more than substantial evidence.

The order after hearing on petition for injunction prohibiting harassment, filed May 5, 1987, is affirmed.

[5/unnumbered sixth page]

_____
Cappaccioli, J.

WE CONCUR:

_____
Agliano, P.J.

_____
Brauer, J.

MARSDEN v. SCULLEN
No. H003153

COURT OF APPEAL OF THE STATE OF

CALIFORNIA

in and for the

SIXTH APPELLATE DISTRICT

FILED

April 15 1988

Court of Appeal -
Sixth App.Dist.
RICHARD J. EYMAN,
Clerk

BY _____
DEPUTY

MICHAEL MARSDEN [sic],	)	
Plaintiff and Respondent,	)	No. H003153
	)	
vs.	)	
	)	
BARBARA SCULLEN [sic]	)	Superior
	)	Court No.
Defendant and Appellant.	)	97871

BY THE COURT

The petition for rehearing is denied.

Dated APR 15 1988

AGLIANO, P.J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

6th District, No. H003153

S005515

IN BANK

SUPREME COURT
FILED
JUN 8 1988
Lawrence P. Gill,
Clerk

DEPUTY

MARSDEN et al., Respondents,

v.

SCULLEN et al., Appellants.

Petition for review of appellant Barbara Scullen DENIED.

LUCAS
Chief Justice

ATTORNEY OR UNREPRESENTED PARTY (NAME AND ADDRESS):	FOR COURT USE ONLY
AUSTIN B. COMSTOCK 340 Soquel Avenue, Suite 205 Santa Cruz, CA 95062	$99.00 [handwritten] FILED Santa Cruz County MAY - 8 1986 RICHARD W. BEDAL, Clerk By /s/ [Art Mendoza], Deputy
TELEPHONE NO.: (408) 427-2727	
ATTORNEY FOR (Name): MICHAEL MARSDEN	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Cruz 701 Ocean Street Santa Cruz, CA 95060	

Plaintiff: MICHAEL MARSDEN

Defendant: BARBARA SCULLEN

ORDER TO SHOW CAUSE (HARASSMENT) [X] AND TEMPORARY RESTRAINING ORDER	CASE NUMBER 97871

1. TO (List name of each defendant):

BARBARA SCULLEN

2. YOU ARE ORDERED to appear at a hearing in this court

a. On (date): 5/21/86
b. at (time): 8:30 a.m.
c. In (room, department, division): TBA [typed] 4 [handwritten]

d. Located at (address):

701 Ocean Street
Santa Cruz, CA 95060

and to give any legal reason why there should not be issued against you an Injunction Prohibiting Harassment, and such other relief as the Court may order.

3. [x] TEMPORARY RESTRAINING ORDER

a. Pending the hearing, the Court further ORDERS THAT (Name): BARBARA SCULLEN Defendant, is prohibited from alarming, annoying, or harassing (Name) MICHAEL MARSDEN Plaintiff, and SPECIFICALLY ORDERS THAT DEFENDANT:

(a) [x] Refrain from threatening, striking, or making physical contact with Plaintiff.

(b) [x] Remain at least 1000 yards away from the following locations:

735 Las Olas Drive, Aptos, California

(c) [ ] Refrain from keeping Plaintiff under surveillance.

(d) [x] Refrain from following Plaintiff.

(e) [x] Remain at least 500 yards away from the following persons (Specify):

MICHAEL MARSDEN

(f) [x] Refrain from contacting Plaintiff by telephone.

(g) [x] Refrain from blocking Plaintiff's movements in public places or thoroughfares.

(THE TEMPORARY RESTRAINING ORDER IS CONTINUED ON THE REVERSE)

VIOLATION OF THIS TEMPORARY RESTRAINING ORDER IS A MISDEMEANOR

If you do not file a "Response to Petition for Injunction Prohibiting Harassment," or if you do not appear at the Court hearing the Court may make further orders against you.

Form Approved by the Judicial Council of California Effective January 1, 1979

ORDER TO SHOW CAUSE (HARASSMENT) AND TEMPORARY RESTRAINING ORDER

CCP 527.6

[back side of form]

3. [x] (Temporary Restraining Order - Continued from other side):

(h) Other (Specify):

Refrain from sending plaintiff messages of any description, whether by regular mail or otherwise.

Refrain from contacting any of plaintiff's friends, employees, neighbors for any purpose having to do with plaintiff.

b. This order shall be enforced by all peace officers in the State of California.

c. [x] The Clerk of this Court shall transmit, by the close of business on this date, this Order to the following law enforcement agencies (Specify):

Santa Cruz County Sheriff
Santa Cruz Police Department

d. This Order shall expire on (Date): 5/21/86

4. The injunction has been sought by Plaintiff (Specify Name): MICHAEL MARSDEN and is based upon the Petition for Injunction Prohibiting Harassment.

5. The defendant shall be personally served with a copy of this Order to Show Cause, the Petition for Injunction

Prohibiting Harassment, a blank Response to Petition for Harassment, and the instructions for Lawsuits to Prohibit Harassment no later than (Date): 5/16/86.

6. Date: 5-8-86

7. /s/ [C. Cottle]
Judge of the Superior Court

Wednesday - 8:30 a.m.
May 21, 1986
DEPT. III

FAMILY LAW PAGE 3

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CRUZ

Christopher C. Cottle, Judge;
Marlene Mange, Deputy Clerk;
Bob McKinley, Bailiff;
Bill McBride, Reporter

Proceedings:	COURT ORDER
97871 (A. Comstock) MICHAEL MARSDEN V. BARBARA SCULLEN OSC RE HARASSMENT	Mr. Comstock is present as counsel for petitioner; respondent is present. Mr. Comstock addresses the court; Ms. Scullen responds. The Court grants its orders as prayed.

CLK 7 100 New (8/76)

MINUTES

ATTORNEY OR UNREPRESENTED PARTY (NAME AND ADDRESS):	FOR COURT USE ONLY
AUSTIN B. COMSTOCK 340 Soquel Avenue Santa Cruz, CA 95062 TELEPHONE NO.: (408) 427-2727 ATTORNEY FOR (Name): MICHAEL MARSDEN	FILED Santa Cruz County MAY 22 1986 RICHARD W. BEDAL, Clerk By /s/ [Judy Dudley], Deputy
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Cruz 701 Ocean Street Santa Cruz, CA 95060	

Plaintiff:
MICHAEL MARSDEN

Defendant:
BARBARA SCULLEN

ORDER AFTER HEARING ON PETITION FOR INJUNCTION PROHIBITING HARASSMENT	CASE NUMBER 97871

1. This matter was heard in court as follows:

a. Date: May 21, 1986

b. Department, division, or room: III

c. Judge: CHRISTOPHER C. COTTLE

2. The following persons were present in court (Specify names):

a. [ ] Plaintiff

[x] Plaintiff's Attorney

AUSTIN B. COMSTOCK

b. [x] Defendant

[ ] Defendant's Attorney

3. [x] IT IS HEREBY ORDERED THAT (Name): BARBARA SCULLEN, Defendant,

is prohibited from alarming, annoying, or harassing (Name): MICHAEL MARSDEN, Plaintiff, and Defendant is specifically ordered to:

a. [ ] Refrain from threatening, striking, or making physical contact with Plaintiff.

b. [x] Remain at least 1000 yards away from the following locations:

735 Los Olas Drive, Aptos, California 95003

c. [x] Refrain from keeping Plaintiff under surveillance.

d. [x] Refrain from following Plaintiff.

e. [x] Remain at least 500 yards from

the following persons (Specify):

MICHAEL Marsden in public places.

f. [x] Refrain from contacting Plaintiff by telephone.

g. [x] Refrain from blocking Plaintiff's movements in public places or thoroughfares.

(THIS ORDER IS CONTINUED ON THE REVERSE)

VIOLATION OF THIS ORDER IS A MISDEMEANOR

Form Approved by the Judicial Council of California Effective January 1, 1979

ORDER AFTER HEARING ON PETITION FOR INJUNCTION PROHIBITING HARASSMENT

CCP 527.6

[back side of form]

(continued from other side)

3. IT IS HEREBY ORDERED THAT (Name): BARBARA SCULLEN, Defendant,

h. [x] Other orders (Specify):

Refrain from:

(1) Sending messages to plaintiff through the mail;

(2) Contacting plaintiff's neighbors, housekeeper and friends.

1. This order shall be enforced by all peace officers in the State of California.

VIOLATION OF THIS ORDER IS A MISDEMEANOR

4. [x] The Clerk of this Court shall transmit, by the close of business on this date, copies of this Order to the following law enforcement agencies:

Santa Cruz County Sheriff's Office, 701 Ocean Street, Santa Cruz, CA

5. [ ] (Name of Party): . . . . . shall pay to (Name): . . . . . $ . . . . . attorneys fees, ... and $ . . . . in court costs.

6. This Order, except for any award of attorney's fees and costs, shall expire at midnight on (Date): May 21, 1989.

7. This Order, including all attachments, has 2 pages.

8. Date: 5 - 22 - 86

9. /s/ [C. Cottle]
Judge of the Superior Court

[Pagination of the original order will be indicated at page turning point by printing respective page numbers in bold brackets, e.g. **[1/2]**.]

AUSTIN B. COMSTOCK
Attorney at Law
340 Soquel Avenue
Santa Cruz, CA 95062
(408) 427-2727

Attorney for Plaintiff,
MICHAEL MARSTEN

FILED
Santa Cruz County

MAR - 6 1987

RICHARD W. BEDAL,
Clerk
By /s/
[Diane Munoz],
Deputy

$14.-
[handwritten]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CRUZ

MICHAEL MARSTEN,

Plaintiff,

vs.

BARBARA SCULLEN,

Defendant.

/

CASE NO. 97871

ORDER TO SHOW CAUSE IN RE CONTEMPT AND TO MODIFY EXISTING INJUNCTION

TO: Defendant BARBARA SCULLEN:

YOU ARE HEREBY ORDERED to appear at

a hearing in Department II of the above-entitled court, 701 Ocean Street, Santa Cruz, California on March 31, 1987 at the hour of 8:30 a.m. and to give any legal reason you have why you should not be held in contempt of this court for violation of the order filed herein on May 22, 1986 and why certain modifications of the said order should not be made in accordance with the request of plaintiff MICHAEL MARSTEN as set forth in the petition attached to this order and declarations attached.

Under the provisions of Code of Civil Procedures Section 1209(a)5, disobedience of any lawful order of this court may be punishable by contempt. Copies of this Order to Show Cause, the attached Petition for Amendment, Declarations of plaintiff and counsel, together with Judicial Counsel Form CH-

[1/2] 110 revised January 1, 1987 shall be served upon defendant not later than 10 days in advance of the date set for hearing above.

DATED: March 6, 1987

/s/ [Wm. M. Kelsay]
JUDGE OF THE SUPERIOR COURT

Tuesday - 8:30 a.m.
March 31, 1987
DEPT. III

LAW & MOTION CALENDAR PAGE ONE

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CRUZ

WILLIAM M. KELSAY, Judge;
Margaret Brubaker, Deputy Clerk;
Don Forbus, Bailiff;
Elisabeth Munter, Reporter

Proceedings:	COURT ORDER
97871 (A. Comstock) MICHAEL MARSTEN V. BARBARA SCULLEN ORDER TO SHOW CAUSE RE CONTEMPT & TOMODIFY [sic] EXISTING INJUNCTION	Counsel, Austin Comstock appearing on behalf of Plaintiff. Counsel, Ray Grueneich appearing on behalf of Defendant. The Court continues the matter to 10:00 a.m. today for hearing (See additional minute orders)

CLK 7 100 New (8/76)

MINUTES

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CRUZ	case number 97871

date
March 31, 1987

Judge
WILLIAM M. KELSAY

clerk
Margaret Brubaker

dept
Two

bailiff
Don Forbus

reporter
Elisabeth Munter

PLAINTIFF:	
MICHAEL MARSTEN	MINUTE ORDER
DEFENDANT:	
BARBARA SCULLEN	

APPEARANCES: Counsel, Austin Comstock appearing with Plaintiff

Counsel, Raymond Grueneich appearing with Defendant

This matter came on regularly for hearing on Order to Show Cause in Re Contempt and to Modify Existing Injunction.

Mr. Grueneich addresses the Court, and Mr. Comstock responds.

Plaintiff's witness, Michael Marsten is sworn, examined by Mr. Comstock and cross examined by Mr. Grueneich.

Plaintiff's witness, Harry Allen Smenk [sic] is sworn, examined by Mr. Comstock and cross examined by Mr. Grueneich.

Plaintiff rests.

Defendant's witness, Barbara Scullen is sworn, examined by Mr. Grueneich, examined by the Court, and cross examined by Mr. Comstock.

The Court finds Defendant to be in contempt of the Court's Order of May 22nd, 1986.

The Court orders that Defendant obey the May 22nd 1986 order, and further orders that Defendant stay at least 100 yards away from the Seacliff State Beach entrance, that Defendant shall not go to Seacliff State Beach, That [sic] she not be at the Aptos Post

Office or the Rancho Del Mar Shopping Center anytime after 10:30 a.m..

The Court orders that Defendant pay $500 attorney fees to Mr. Comstock.

CLK 800 (Rev 2/77)

MINUTE ORDER (CIVIL)

[Pagination of the original order will be indicated at page turning point by printing respective page numbers in bold brackets, e.g. **[1/2]**.]

AUSTIN B. COMSTOCK
Attorney at Law
340 Soquel Avenue
Santa Cruz, CA 95062
(408) 427-2727

Attorney for Plaintiff,
MICHAEL MARSTEN

FILED
Santa Cruz County
APR 21 1987
RICHARD W. BEDAL,
Clerk
By /s/
[Ruth Mooney],
Deputy

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CRUZ

MICHAEL MARSTEN,

Plaintiff,

vs.

BARBARA SCULLEN,

Defendant.
_____/

CASE NO. 97871

ORDER IN RE CONTEMPT

The captioned cause came on regularly for hearing in Department II of the above-entitled court on March 31, 1987. MARSTEN and Raymond Grueneich appeared as attorney for plaintiff

MICHAEL MARSTEN and Raymond Grueneich appeared as attorney for defendant, BARBARA SCULLEN. Evidence was presented by plaintiff, and defendant elected to take the stand and testify. The matter was submitted, and the court finds that defendant BARBARA SCULLEN, aka BRANKA SCULLEN, willfully violated the following orders of the injunction filed herein on May 22, 1986:

Defendant BARBARA SCULLEN failed to remain at least 1,000 yards from plaintiff's residence at 735 Las Olas Drive, Aptos, California; defendant failed to refrain from keeping plaintiff under surveilance [sic]; defendant failed to refrain from **[1/2]** following the plaintiff; defendant failed to remain at least 500 yards from plaintiff in public places; defendant failed to refrain from sending messages to

plaintiff through the mail.

It is therefore the order of this court that defendant BARBARA SCULLEN, aka BRANKA SCULLEN, be and hereby is found to be in contempt of the foregoing orders of this court. The court reserves the imposition of punishment and permits defendant to purge herself of this contempt by comlying with all orders of this court pursuant to the order after hearing held on March 31, 1987 and filed herein on April , 1987 through May 20, 1987 or any lawful extension thereof. Failure to comply with the said orders may result in incarceration, civil fine or both.

DATED: April 20, 1987

/s/ [WILLIAM M. KELSAY]
WILLIAM KELSEY [sic], Judge of the Superior Court

Approved as to form and content.

DATED: April , 1987

[blank]
RAYMOND GRUENEICH, Attorney

for Defendant

ATTORNEY OR UNREPRESENTED PARTY (NAME AND ADDRESS): AUSTIN B. COMSTOCK 340 Soquel Avenue Santa Cruz, CA 95062 TELEPHONE NO.: (408) 427-2727 ATTORNEY FOR (Name): Plaintiff, MICHAEL MARSDEN	FOR COURT USE ONLY FILED Santa Cruz County MAY 5 1987 RICHARD W. BEDAL, Clerk By /s/ [Ruth Mooney], Deputy
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Cruz 701 Ocean Street Santa Cruz, CA 95060	
Plaintiff: MICHAEL MARSDEN Defendant: BARBARA SCULLEN	

ORDER AFTER HEARING ON PETITION FOR INJUNCTION PROHIBITING HARASSMENT	CASE NUMBER 97871

1. THIS ORDER, EXCEPT FOR AWARD OF ATTORNEY FEES AND COSTS, SHALL EXPIRE AT MIDNIGHT ON (date): May 20, 1989

2. This proceeding came on for hearing as follows:

Date: March 31, 1987
Time: 8:30 a.m.
Dept.: II
Room:

3. Judge (name): William Kelsey [sic]

[ ] Temporary Judge

4. [x] Plaintiff present

[x] Attorney present (name): Austin B. Comstock

[x] Defendant present

[x] Attorney present (name): Raymond C. Grueneich

5. After hearing on the petition, IT IS ORDERED THAT DEFENDANT (Name): Barbara Scullen, aka Branka Scullen

6. **Not alarm, annoy, or harass plaintiff**
[ ] and the following family and household members (names):

and SPECIFICALLY IT IS ORDERED THAT DEFENDANT SHALL

a. [ ] not threaten, strike, or make physical contact with plaintiff
[ ] and the following family and household members (names):

b. [x] not keep plaintiff under surveillance
[ ] and the following family and household members (names):

c. [x] not follow plaintiff
[ ] and the following family and household members (names):

d. [x] not telephone plaintiff
[ ] and the following family and household members (names):

e. [x] not block plaintiff's movements in public places or thoroughfares.
[ ] and the following family and household members (names):

VIOLATION OF THIS ORDER IS A MISDEMEANOR, PUNISHABLE BY A $1,000 FINE, SIX MONTHS IN JAIL, OR BOTH. THIS ORDER SHALL BE ENFORCED BY ALL LAW ENFORCEMENT OFFICERS IN THE STATE OF CALIFORNIA.

(Continued on reverse)

Form Approved by the Judicial Council of California
CH-140
(Rev. January 1, 1987)

ORDER AFTER HEARING ON PETITION FOR INJUNCTION PROHIBITING HARASSMENT

CCP 527.6

[page two (back side) of form]

PLAINTIFF (Name):	CASE NUMBER
MICHAEL MARSTEN	97871
DEFENDANT (Name):	
BARBARA SCULLEN	

7. a. [x] Stay at least 1,000 yards away from the following persons and places:
(The addresses of these places are optional and may be kept confidential.)

(1) Plaintiff
[ ] and the following family and household members (names):

(2) [x] Plaintiff's residence (address optional):

735 Los Olas Drive, Aptos

(3) [ ] Plaintiff's place of work (address optional):

(4) [ ] Plaintiff's children's school or place of child care (address optional):

(5) [x] Other (specify):
(address optional):

Plaintiff in public places

b. [ ] Contacts relating to pick up and delivery of children

pursuant to a court order or a stipulation of the parties arrived at during mediation shall be permitted.

8. OTHER ORDERS (Specify):

Defendant shall refrain from (1) sending messages to plaintiff through the mail; (2) contacting plaintiff's neighbors, housekeeper and friends; (3) being 100 yards from the entry of Seacliff State Park; (4) refrain from being within the boundary of Seacliff State Park, Aptos, California; (5) refrain from being at the Aptos Post Office or the Rancho Del Mar Shopping Center after the hour of 10:30 a.m.; (6) Defendant shall pay to Austin B. Comstock the sum of $500 toward attorney's fees incurred by plaintiff.

9. By the close of business on the date of this order, a copy of this order and any proof of service shall be given to the law enforcement agencies listed below as follows:

a. [ ] plaintiff shall deliver.

b. [x] plaintiff's attorney shall deliver.

c. [ ] the clerk of the court shall mail.

Law enforcement agency

Santa Cruz County Sheriff's Office

Address

701 Ocean Street, Santa Cruz, California

THIS ORDER IS EFFECTIVE WHEN MADE. THE LAW ENFORCEMENT AGENCY SHALL ENFORCE THE ORDER IMMEDIATELY UPON RECEIPT. IT IS ENFORCEABLE ANYWHERE CALIFORNIA BY ANY LAW ENFORCEMENT AGENCY THAT HAS RECEIVED THE ORDER OR IS SHOWN A COPY OF THE ORDER. IF PROOF OF SERVICE HAS NOT BEEN RECEIVED, THE LAW ENFORCEMENT AGENCY SHALL ADVISE THE RESTRAINED PERSON OF THE TERMS OF THE ORDER AND THEN SHALL ENFORCE IT.

Date: ~~April~~ May 1, 1987
RG [hand initialled]

/s/ [Wm M Kelsay]
Judge of the Superior Court

Approved as to form and content. /s/[Raymond C. Grueneich] [hand initialled] RG
Dated: ~~April~~ May 1, 1987 RAYMOND C. GRUENEICH [handwritten]

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a copy of the foregoing was mailed first class, postage prepaid, in a sealed envelope addressed as shown in item 9, and that the mailing of the foregoing and execution of this certificate occurred

at (place): , California,
on (date):

Clerk, by _____ , Deputy

CH-140 (Rev. January 1, 1987)

ORDER AFTER HEARING ON PETITION FOR INJUNCTION PROHIBITING HARASSMENT

[Pagination of the original Appellant's Opening Brief (AOB) will be indicated at page turning point by printing respective page numbers in bold brackets, e.g. **[1/2]**.]

1/CIV H003153

IN THE COURT OF APPEAL

FOR THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MICHAEL MARSDEN [sic])	NO. 1/CIV
PLAINTIFF-RESPONDENT)	H003153
)	
VS)	(SUP.CT: SANTA
)	CRUZ 97871)
BARBARA SCULLEN [sic])	
DEFENDANT-APPELLANT)	
)	

APPELLANT'S OPENING BRIEF

BARBARA SCULLEN
APPELLANT
P.O. BOX 317
SANTA CRUZ, CA 95061
TEL: (408) 458-1541

ATTORNEY IN PRO PER

[i/ii]

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1/CIV H003153

IN THE COURT OF APPEAL

FOR THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MICHAEL MARSDEN [sic]) PLAINTIFF-RESPONDENT)	NO. 1/CIV H003153
VS)	(SUP.CT: SANTA CRUZ 97871)
BARBARA SCULLEN [sic]) DEFENDANT-APPELLANT)	

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

Plaintiff and Respondent on appeal filed the initial "Petition for Injunction Prohibiting Harassment and Temporary Retraining [sic] order"on May 8, 1986. C.T. 1. A [sic] OSC/TRO was issued and a hearing conducted on May 21, 1986 pusuant to the petition. C.T. 6,7. An order issued on May 22, 1986 enjoining Defendant from coming

within 1000 yards of Plaintiff's residence, 500 yards from the person of Plaintiff, prohibiting surveillance, blocking movements of Plaintiff, sending messages to Plaintiff and contacting Plaintiff's neighbors, housekeeper and friends. C.T. 13.

The order was modified by written stipulation executed between the parties but not submitted for judicial signature to reduce the stay away term from Plaintiff's residence from 1000 to 500 yards.

[1/2]

Ten months after the order, on March 6, 1987, Plaintiff filed an amended petition re harassment and a contempt proceeding alleging violation of the initial May 22, 1986 order. C.T. 15. The hearing on the amended

petition and the trial on the contempt was set and held jointly on March 31, 1986. Plaintiff,'s [sic] witness and Defendant testified. C.T. 25.

The court issued an order in re contempt (C.T. 27) and an injunction based upon the amended harassment petition. (C.T. 29). The contempt order found Defendant to be in contempt and "reserve[d] [bracketed letter appears in AOB] the imposition of punishment" so long as Defendant obeys the injunction. C.T. 27, 28.

A timely notice of appeal was filed on May 29, 1987 also requesting preparation of the clerk's record and reporter's transcript.

STATEMENT OF FACTS: BACKGROUND

Defendant has regularly visited

Seabright State Park for 20 years and Rancho Del Mar shopping center for 10 years. A half dozen years ago, Plaintiff and Defendant had some sort of informal casual contact. Defendant took concern for what she alleges is Plaintiff's indenture to alcohol and illegal drugs. Plaintiff has filed this action to prevent further contact with Defendant.

Plaintiff lives on the end of a dead end street that doubles as the only entrance to Seabright State Park Beach and shops at the Rancho Del Mar Shopping Center which is situated within a few miles of his residence.

[2/3]

Defendant is a middle aged educated woman with a history free of any criminal arrests or prior harassment

actions of any sort. She lives in the City of Santa Cruz, some ten miles north from Seabright State Park, which borders the Pacific ocean in Santa Cruz County, California.

STATEMENT OF FACTS:

CONTEMPT TRIAL OF MARCH 31, 1987

Plaintiff, Plaintiff's witness, and Defendant testified at the March 31, 1987 contempt hearing, Plaintiff represented by Mr. Comstock and Defendant by Mr. Grueneich, both of Santa Cruz County.

Defendant's counsel made initial objections to the declaration stating that the requirement for specificity per CCP 1121.5 was not met as to many of the allegations. All agreed that some of

the allegations were alleged with enough speicificity to go forward on those. The allegations not specifically alleged consisted of contacting friends and staying 1000 yards away from the residence. Those allegations stipulated as properly before the court were: 1) sending a message in the mail, 2) following/surveillance, 3) being within 500 yards of Plaintiff's person. R.T. 1-6.

Plaintiff testified that Defendant had followed him daily although he wasn't able to see her directly behind him from his car while driving. Plaintiff further testified that Defendant sent him letters and offered one as evidence.

Plaintiff's witness, Harry Allen

Smeenk, then took the stand and stated that as a building contractor he has had regular business in the area of Plaintiff's residence. He stated that he saw Defendant parked near **[3/4]** Plaintiff's residence about twenty percent of the times that he visited that area, once by an electronic gate some 200 feet from Plaintiff's residence. He further testified that his business relayed to him that Defendant had called Smeenk's business wanting to talk with Smeenk.

The Defendant, Ms. Scullen [sic], took the stand answering questions from both counsel and the Judge. She denied following Plaintiff or parking near the gate. R.T. 26. She stated that she parked at the end of the parking lot on the opposing side of the beach, which in

her estimation was beyond the 500 yards as required in the stipulation made between the parties. R.T. 15, 26, 27, 28.

[4/5]

ARGUMENT

I.

THE COURT IMPOSED PROBATION BY RESERVING IMPOSITION OF SENTENCE.

A. RESERVATION OF IMPOSITION OF SENTENCE CREATES PROBATION

By reserving the imposition of sentence the court put Defendant on probation. "As used in this code probation shall mean the suspension of the imposition ... of sentence." Penal Code Section 1203. People v. Victor

(1965) 62 C.2d 280; 42 Cal.Rptr. 199. (While the exact term to be used in this case is "conditional sentence" due to lack of formal supervision the term "informal probation " or simply "probation" is used interchangeable [sic] and correctly. The method of supervision is not relevant but the fact of suspension is central.)

"The court is without power to suspend a sentence except as an incident to granting probation." Oster v. Municipal Court (1955), 45 C.2d 134, 141; 287 P.2d 755.

[5/6]

B. INDETERMINATE DURATION OF PROBATION VIOLATES THE STATUTES GOVERNING PROBATION

The contempt order reserves

imposition of sentence until a certain date "or any lawful extension thereof." C.T. 28. The threat of imposition of sentence could last indefinitely since there is no outside limit. The harassment order referred to in the contempt order has no limit as to the number of three year periods of extension. C.C.P. 527.6(d).

California Penal Code limits the duration of probation to three years for misdemenors and five years (or maximum term) for felony offenses. Penal Code section 1203a. People v. Goldberg (1975), 45 C.A.3d 601; 119 Cal. Rptr. 616. People v. Ottovich (1974) 41 C.A.3d 532; 116 Cal.Rptr. 120. "[N]o [bracketed letter in AOB] single grant of misdemeanor probation may exceed three years." In re Hamm (1982), 133

C.A.3d 60, 67; 183 Cal.Rptr. 626.

The trial court in this case exceeded its power by imposing a term probation that had no limit as to duration. If [sic] fact, the term could run for the life of Defendant, any number of years.

Therefore the court is without jurisdiction, acting beyond its power, in imposing a term of probation of indefinite duration. The reviewing court must annul such an order that explicitly violates the laws of this State.

[6/7]

II.

IF THE ORDER IS CONSTRUED AS OTHER THAN PROBATION THEN IT FAILS TO MEET STATUTORY REQUIREMENT AND THE CONSTITUTION DUE PROCESS GUARANTEES.

A. IF THIS ORDER IS NOT ONE OF PROBATION THEN THE TRIAL COURT HAS FAILED TO SET A SENTANCING [sic] DATE WITHIN SPECIFIC TIME PERIODS

In Superior Court, the sentencing date must be held within 28 days of judgement [sic]. Penal Code section 1191. That has failed to occur: the date of judgement [sic] was May 1, 1987. Therefore, the order must fail.

B. THE RESERVATION OF IMPOSITION OF PUNISHMENT WITHOUT DUE PROCESS PROTECTIONS IS UNCONSTITUTIONAL

If the probation guidelines are not applicable to the imposition of sentence then what are the guidelines to be applied. Where are they to be found. [sic]

The thrust of the courts linkage is to pressure the Defendant to obey the new Harassment order. While this purpose is legitimate, the process is not. No provision of due process is made for Defendant to controvert new allegations of violating the new harassment injunction: no hearing, confrontation, or testimony. Could

imposition occur from a backroom chambers determination based upon an uncontroverted affidavit?

Indeed, without the protections so thoroughly laid out in probation situations, the Defendant is subject to arbitrary and unknown actions by the government. Can this be constitutional. [sic] An order of indefinite length threatening to deprive the Defendant of liberty at any time possibly without notice or an opportunity to confront, uninformed as to the standard of proof, if any.

III.

THE TRIAL COURT'S ORDER, BY RESTRICTING NUMEROUS CONSTITUTIONAL RIGHTS, IS DEFECTIVE AND WITHOUT STATUTORY AUTHORITY

A. THE ORDER IS VOID FOR VAGUENESS

The order under appeal restricts Defendant's right to "contact friends, housekeeper and neighbors" R.T. 30. This specific language has been declared constitutionally improper as vague and overbroad.

The "portion of the trial court's order prohibiting [Defendant] [bracketed word in AOB] from 'contacting' any of the residents of the mobilehome park is

also infirm as unconstitutionally overbroad, because its vague wording appears to prohibit lawful as well as unlawful activity. That is, it could be interpreted to **[8/9]** prohibit not only physically or verbally threatening 'contact,' but also constitutionally protected speech. [citations] [bracketed word in AOB]." Smith v. Silvey (1983), 149 C.A.3d 400, 406-407; 97 C.R. 15.

The classification "friends, housekeeper and neighbors" is undefined and without objective limits. If plaintiff mingles with local Chamber of Commerce, making friends, does that mean that Defendant is prohibited from attending Chamber of Commerce public meetings. The classification of friends is malleable and changing. Even the concept of "neighbor" includes a wide

variety of persons depending on the light of interpretation.

B. THE ORDER ON APPEAL IS OVERBROAD AND FAILS TO MEET THE BALANCE TEST.

The order subject to this appeal prohibits lawful as well as unlawful activity. "An injunction, like a statute, may be attacked under some circumstances as unconstitutionally overbroad if it prohibits lawful as well as unlawful activity. [citations] [bracketed word in AOB]." California Retail Liquor Dealers Institute v. United Farm Workers (1976), 57 C.A.3d 606, 129 Cal. Rptr[.] 407.

The court uses a balance test in evaluating the legality of an order. "[A] [bracketed word in AOB] court must

weight [sic] the extent of the impairment against both the importance of the governmental interest and the substantiality of the threat which the forbidden speech or related activity poses to that interest." L. A. Teachers Union v. L. A. City Board of Education (1969), 71 C.2d 551, 556; 78 Cal.Rptr. 723.

[9/10]

The legitimate purpose of the order is to protect Plaintiff from harassment from Defendant. It legitimately forbids direct harassment and illegal activity but goes on to prevent contact with an unspecified set of person [sic] labeled as "friends [...] and neighbors." In fact, that group was never specified nor its size determined. Dos [sic] the Plaintiff have 10, 100, or 1000 friends in this county? If Plaintiff is a

public person, or becomes one during this [sic] effective period of this order (which could be decades), he could have friends to the extent that Defendant could hardly avoid them in the regular course of her life. In fact, Defendant doesn't know who are Plaintiff's friends.

C. THE ORDER UNDER APPEAL IMPROPERLY INFRINGES UPON THE FREE SPEECH RIGHTS OF DEFENDANT

The prohibition includes all "contact" with certain groups of persons. "It could be interpreted to prohibit not only physically or verbally threatening "contact," but also constitutionally protected speech." Smith v. SilveyS [sic] (1983), 149 C.A.3d 400, 407; 197 Cal. Rptr[.] 15.

This order attempts to prohibit any contact with "Friend," whether political, religious or plain harassment by Defendant. This order intends to limit Defendant's right of speech under the U.S. Constitution and the California Constitution.

[10/11]

In order to impair a persons [sic] First amendment rights, a balance must be made. That balance requires that a "clear and present danger" must be found. Smith, 149 C.A.3d 400, 407. The transcript reveals no such finding that contact with the friends of neighbors would constitute such a danger, or any danger at all. Do Defendant's activities "constitute a 'serious substantial evil' to a right or interest having equal dignity and protection with First Amendment liberties." Smith v.

Silvey (1983), 149 C.A.3d 400, 407.

D. THE ORDER APPEALED FROM VIOLATES DEFENDANT'S CONSTITUTIONAL RIGHT OF ASSOCIATION.

It is hornbook law that the U.S. constitution protects the right of association. The order under appeal prohibits Defendant's association with those who might otherwise associate with Defendant. Plaintiff's involvement with any group would act to automatically eject Defendants [sic] association with that group EVEN IN PLAINTIFF'S ABSENCE. Defendant would have to assume that Plaintiff made "friends" within that group in order to avoid violation of the order.

[11/12]

THE RIGHT OF FREE SPEECH
INURES TO THE BENEFIT OF BOTH
THE SPEAKER AND THE LISTENER
AND RESTRICTIONS WITHOUT
REQUEST OF RESTRICTIN [sic] BY
LISTENER IS VOID

This order prohibits such protected speech with persons that have never complained to the court, or even know about this order at all. This order violates their right to hear protected speech from Defendant. Free speech runs both ways, protecting the speaker and the listener.

The order preemptively denies Defendant her right of speech to persons BEFORE they complain. This situation has been addressed by the court and struck down as a violation of the First

Amendment guarantees. Alternatives for California Women, Inc. vs. County of Contra Costa (1983) 145 C.A.3d 436, 449-450; 193 Cal. Rptr. 384.

IV

THE STATUTE, BY ITS OWN TERMS, PREVENTS THE COURT FROM ENJOINING CONSTITUTIONALLY PROTECTED RIGHTS

The statute explicitly limits itself to restricting non-protected behavior. this statute gives the court power to prohibit harassment. Harassment is defined as a course of conduct offensive to a plaintiff. **[12/13]** However, a course of conduct which is constitutionally protected

cannot be restricted. "Constitutionally protected behavior is not included within the meaning of 'course of conduct.'" CCP sec. 527.6(b).

V.

THE STATUE [sic] GIVES THE POWER TO PROHIBIT HARASSMENT, BUT DOES NOT GIVE THE POWER TO PROHIBIT NON-HARASSING BEHAVIOR.

The language of [the] statute empowers the court to enjoin that "course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which served no legitimate purpose." C.C.P. section 527.6(b). The statute DOES NOT authorize enjoining a course of

conduct that does not constitute harassment. Once this explicit limiting language is broken then the limit becomes meaningless. The floodgates open by crossing the bright line.

This modern statute, using clear and concise language cannot support this Contempt order. This statute, by imposing criminal sanctions (arrest and loss of liberty), must be strictly construed and interpreted narrowly.

The restrictions of the harassment order DO enjoin activities that cannot be forced into the definition of harassment as defined in this section. The order enjoins Defendant from visiting a shopping center and a federal post office "after 10:30AM." C.T. 30. Plaintiff does not live or work at the

shopping center or the post office. Defendant's presence at these places is **[13/14]** not in itself a "course of conduct" of harassment. Defendant's presence does serve a legitimate purpose. Defendant has regularly frequented the shopping center and the post office for over ten years, long before any contact with Plaintiff. C.T. 28, 32. Defendant has established personal and business contacts at the shopping center. Today, as in all times, a place of commerce is a place of social activity central to the lives of the participants. This socialization is a legitimate activity that Plaintiff cannot claim is seriously harmful to him.

The same could be said for Defendant's habit of frequenting

Seabright State Beach. However, due to the proximity of Plaintiff's house Plaintiff' [sic] necessity of using Seabright Beach access road Plaintiff's interest is greater.

If Plaintiff is not at or near the shopping center, what claim to serious harm or alarm can he have to Defendant's presence where he is not? Plaintiff is protected, and without objection from Defendant, by a 1000 yard stay-away provision. 1000 yards is ten football fields, more than one half a mile.

The trial court's order attempts to remove of [sic] possibility of harassment by enjoining legitimate non-harassing behavior. The court's intention is understandable. However, intention does not justify the means.

Once the court is permitted to enjoin legitimate behavior on the basis of preventing the possibility of harassment then there is no stopping the power of government. Regardless of the sympathies in this particular court, the question before the appellate court is not of personalities of the parties but the balance of law and liberty under the laws of this land.

[14/15]

Restrictions relating to Plaintiff's residence and person are inherently limited. A person has a residence and a body: two finite points directly relevant to that person. The banning from broad locations that have only tangential relation to the person is overbroad and dangerous.

Could the court ban Defendant from

Santa Cruz County, California? All places in the world but her house, such as is done in South Africa. Those judges that ban political opponents in South Africa, Chile, South Korea most probably believe they are doing the "right" thing. Their motives may be good but their actions trample on people [sic] rights. The only thing that protects citizens of this land is the constitution, the laws and those courts and judges that uphold those laws. One may not like the Defendant, one may feel sympathy for the Plaintiff, but is that relevant to the application of constitutional guarantees to actions of the state. The road to hell...

[15/16]

CONCLUSION

The linkage of the reservation of

imposition of sentence with the harassment injunction created a probation without limits as to duration. The statute clearly prohibits this. The specter of jail hanging indefinitly [sic] over a person's head is cruel and unusual.

The order is vague, overbroad and violates the First Amendment of the U.S. and CAlifornia [sic] Constitutions by prohibiting "contact" with "friends [...] and neighbors."

The Harassment order in itself violates its own empowering statue [sic] by enjoining acts that are 1) constitutionally protected and 2) legitimate acts that do not constitute harassment.

While this is not a political case or one necessarily eliciting sympathy on its facts, a failure of this appellate court to reverse the trial court's order gives amunition [sic] for rule without law. Such would render America not the land of the free protected by law but the land of the powerful using the courts as their instruments of despotism.

By ruling in favor of this appeal, the appellate court gives the trial court an opportunity to amend its own order to protect the Plaintiff, uphold the Constitution, conform to the statutes, and protect citizens from the horror and capritiousness [sic] of government without respect for its own

Respectfully submitted,

/s/ [Branka Scullin] 8/20/1987
BARBARA SCULLEN [sic]
APPELLANT AND DEFENDANT IN PRO PER

[16/17]

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Smith v. Silvey (1983), 149 C.A.3d 400; 97 C.R. 15.

California Code of Civil Procedure sections [sic] 527.6

California Penal Code sections 1191, 1203, 1203a.

U.S. Constitution, First Amendment

California Constitution

[Pagination of the original Respondent's Brief (RB) will be indicated at page turning point by printing respective page numbers in bold brackets, e.g. **[1/2]**.]

1/CIV

IN THE COURT OF APPEAL

FOR THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MICHAEL MARSTEN

Plaintiff/Respondent

vs.

BARBARA SCULLEN [sic]

Defendant/Appellant

/

APPELLATE NO. H-003153

NO. 1/CIV

(SUP.CT: SANTA CRUZ 97871)

RESPONDENT'S BRIEF

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People vs. Tusaro [sic] (1971) 18 Cal.App. 3d 877.

RE: Buckley (1973) 10 Cal. 3d 237.

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California Code of Civil Procedures [sic] Section 904.1

California Code of Civil Procedures [sic] Section 1222.

U.S. Constitution, First Amendment

California Constitution, Art. I, Section 1 and Section 2.

OTHER AUTHORITIES

Witkin, 7 Calif. Proc. 3d, Trial, 175

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1/CIV

IN THE COURT OF APPEAL

FOR THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MICHAEL MARSTEN

Plaintiff/Respondent

vs.

BARBARA SCULLEN [sic]

Defendant/Appellant

/

APPELLATE NO. H-003153

NO. 1/CIV

(SUP.CT: SANTA CRUZ 97871)

RESPONDENT'S BRIEF

I

STATEMENT OF THE CASE

Plaintiff filed the "Petition for Injunction Prohibiting Harassment and Application for Temporary Restraining Order" on May 8, 1986. (C.T.1) An Order to Show Cause (Harassment) and Temporary Restraining Order issued on May 8, 1986.

(C.T.6) A hearing was held on May 21, 1986 before Judge Christopher Cottle of the Santa Cruz Superior Court, Plaintiff was present with his attorney, Austin B. Comstock and Defendant was present in pro per. (C.T.12) An Order after Hearing issued on May 22, 1986 enjoining Defendant from alarming, annoying, or harassing Plaintiff; Defendant was to remain at least 500 yards from Plaintiff in **[1/2]** public places and 100 yards from his residence at 735 Los Olas Drive in Aptos; Defendant was to refrain from contacting Plaintiff by telephone and refrain from blocking his movements in public places or thoroughfares; Defendant was further ordered to refrain from sending messages to plaintiff through the mail or from contacting plaintiff's neighbors, housekeeper and friends. (C.T.13,14)

On March 6, 1987 an Order to Show Cause Re Contempt issued and Plaintiff filed an Amended Petition for Injunction Prohibiting Harassment asking that the original order be modified to include stay away orders from Seacliff State Park, Rancho Del Mar Shopping Center and the Aptos Post Office. (C.T.15,16)

The hearing on the Amended Petition and Re Contempt was held on March 31, 1987 before Judge William Kelsay. Plaintiff was present with his attorney, Austin B. Comstock and Defendant was present with her attorney, Raymond Grueneich. (C.T.25)

An Order Re Contempt issued on April 21, 1987 with the court finding Defendant in contempt of the orders of injunction filed on May 22, 1986 (C.T.27) Defendant violated the May 22, 1986 Order by failing to refrain from

keeping plaintiff under surveillance; failing to remain at least 1,000 yards from plaintiff [sic] residence; failing to refrain from following plaintiff; failing to remain at least 500 yards from plaintiff in public places; and failing to refrain from sending messages to plaintiff through the mail.

An Order after Hearing on Petition for Injunction issued on May 5, 1987 and amended the Order of May 22, 1986 to include: Defendant shall refrain from being 100 yards from the entry of Seacliff State Park; refrain from being within the boundary of Seacliff State Park, Aptos, California; refrain from being at the Aptos Post Office or the Rancho Del Mar Shopping Center after 10:30 a.m. (C.T.30)

Defendant filed a Notice of Appeal on May 29, 1987.

STATEMENT OF FACTS

Plaintiff lives on a dead-end street which also serves as the entrance to Seacliff State Park in Aptos. There are 27 houses on the street and the entry to the road is gated. (C.T. 4:1-4)

In approximately 1979, Defendant worked as a nurse for one of Plaintiff's neighbors and became acquainted with Plaintiff at that time. Defendant began a campaign of harassment which has continued for six years wherein she follows Plaintiff in both public and private places, sends him messages through the mail, contacts friends and neighbors and housekeepers in order to contact Plaintiff indirectly, calls him on the telephone, and parks in front of his home for hours at a time. (C.T.3,4)

Defendant lives in Santa cruz, California which is approximately 8

miles from Plaintiff's neighborhood. (R.T.36:21-23) Plaintiff's home is less than 1/2 mile from the shopping center known as Rancho Del Mar and the Aptos Post Office is within one mile of his home.

///

[3/4]

ARGUMENT

I

NO APPEAL MAY BE TAKEN FROM A FINAL AND CONCLUSIVE JUDGMENT OF CIVIL CONTEMPT.

California Code of Civil Procedure Section 904.1

By express statutory provision, the judgments and orders of a court or judge made in a contempt case are final and conclusive. C.C.P. section 1222 A review of an order or judgment of contempt may be had by habeas corpus,

certiorari or prohibition. Smith v. Habeggar (1963) 213 Cal.App.2d 183, 184.

When presented to the court in a proper procedural format, contempt orders are subject to review only to show that the court exceeded its jurisdiction. Ex Parte Smith (1878) 53 CAl. [sic] 204, 207; Bridges v. Superior Court of Los Angeles County (1939) 14 Cal.2d 464, 484-485.

The scope of review upon application of writ of habeas corpus is limited to an inquiry by the reviewing court as to whether the act charged against the alleged contemptnor [sic] confers jurisdiction to adjudicate the contempt and if so was there "sufficient" evidence to sustain the judgment. Re Buckley (1973) 10 Cal.3d 237, 247; Bridges v. Superior Court, supra.

Therefore, to the extent that Appellant's posture before this court purports to be an appeal from an order of contempt, it is procedurally defective and should be dismissed.

[4/5]

Any cursory review of the record indicates that there is sufficient evidence to sustain the trial court's judgment of contempt. Respondent's uncontroverted testimony that Appellant contacted him and talked to him, was inches from him and followed him daily everywhere he went (R.T. 10 7-15) establishes a violation of the Order of May 22, 1986. Appellant's own testimony that she contacted Respondent by mail establishes a violation of the Order. (R.T. 35:24) In response to an inquiry by the court, Appellant admitted that she goes to the shopping center and

to the state beach with the hope of seeing Respondent. (R.T. 34:5-6)

Appellant may not appeal a finding of contempt and even if the court construes this appeal as a petition for a writ of habeas corpus, the evidence is sufficient to sustain the trial court's finding of contempt.

II

AS A GENERAL RULE, A REVIEWING COURT MAY NOT INQUIRE INTO THE REASONABLENESS OF A CONTEMPT PUNISHMENT FIXED BY THE TRIAL COURT WITHIN THE STATUTORY MINIMUM.

People vs. Fusaro
(1971) 18 Cal.App.3d 877, 888

As punishment for contempt a court may impose a fine not exceeding $500 or up to five days imprisonment or both. Code Civ. Proc. section 1218.

A California court has

discretionary power within the statutory limit to fix, alter, remit, suspend, or postpone the punishment. People v. Fusaro, supra.

The trial court has wide discretion in fashioning contempt remedies. Each sentence may be fashioned to meet the circumstances of each individual case. **[5/6]**

> "...where a court has issued a prohibitory injunction and it has been violated and the effect of the violation can be cured by a further direction to the contemptnor [sic] to perform that curative act, such order can be validly made."
>
> Alpine Palm Springs Sales, Inc. vs. Superior Court (1969) 274 Cal.App.2d 523,538

In the case before this court, the order was fashioned to prevent Respondent from being subjected to further contact by Appellant. The order was specifically fashioned not to punish

Appellant but to achieve compliance with the court order. (R.T.44:13-22)

Sanctions were reserved for the duration of the injunction at the request of Appellant's own counsel as an alternative to immediate jail time and/or fine. (R.T.48 25) Appellant now argues that the very suspended sentence which she requested from the court be used as a tool to set aside the judgment of the trial court.

III

PROVISIONS OF THE PENAL CODE ARE INAPPLICABLE IN A CIVIL ACTION RE CONTEMPT.

Penal Code section 1203 relied on by Appellant in her opening brief is inapplicable to the instant proceedings which are civil in nature rather than criminal. The provision of the penal

code for punishment of offenses has no application to punishment of contempts defined by or committed under the Code of Civil Procedure. Witkin, 7 Calif. Procedure 3dEd. [sic] Trial, Sections 175, 176.

While a civil contempt proceeding is criminal in nature because of the penalties which may be imposed, the instant **[6/7]** proceedings were brought under Civil Code section 527.6 and therefore Penal Code provisions relating to sentencing and probation are not applicable.

A civil contempt proceeding can either be for criminal contempt or civil contempt. The nature of the proceedings will be determined by what is sought to be accomplished by imposing sentence. If the purpose of the sentence is to vindicate the dignity or the authority

of the court, then the proceeding is criminal in nature. the nature of the proceeding will be deemed to be civil in nature where the sentence imposed is intended primarily to protect and enforce rights of private parties by compelling obedience to court orders and decrees. People v Derner (1986) 182 Cal.App.3d 588, 591, 592.

The record before us reveals that the primary purpose of the trial court's order was coercive, that is to dissuade Appellant from engaging in any reoccurrence of her past violations of the order not to harass, annoy or contact Respondent. The order was not made to punish her for her past violations. (R.T. 40 7-8)

The trial court's order found Appellant in civil contempt, not criminal. Even if the nature of the

contempt proceedings had been criminal, the Penal Code provisions cited by Appellant would still not apply because the overall proceeding was civil not criminal.

///

[7/8]

IV

THE TRIAL COURT'S ORDER WAS TAILORED SPECIFICALLY TO THE CIRCUMSTANCES OF THIS UNIQUE FACT SITUATION AND IS NO MORE RESTRICTIVE THAN NECESSARY TO PROTECT RESPONDENT FROM FURTHER HARASSMENT BY APPELLATE [sic].

A. The purpose of Code of Civil Procedure Section 527.6 is to provide quick relief to harassed persons.

According to an analyiss prepared for the Senate Committee on Judiciary contained in the legislative history of

section 527.6, the bill was intended to establish an expedited procedure for enjoining courses of conduct which constituted "harassment".

The legislative history further reveals that the source of the bill was a coalition of McGeorge Law students and that the impetus for this bill was an intimidating experience suffered by a Sacramento law student. As described in the July 4, 1977 issue of Newsweek magazine: He followed her day after day...He pressed his face against the windows of her classroom and peered at her around bookstacks in the library. He swathed her car in red and white camellia blossoms. He called her 40 times a weekend and sent her gifts. When she fled to her parents' home 150 miles away, he would park nearby for hours. Diamond View Ltd. v. Herz (1986)

180 Cal.App.3d 612, 619.

From the legislative history and the record in this case, it is clear that the factual situations are virtually identical. Respondent has been followed by Appellant on a daily basis. (R.T. 8:3) "She follows me into Aptos, and **[8/9]** wherever I go, she's there." (R.T.8:6-8) Appellant follows Respondent "within inches" (R.T.10:10); contacts him in public places and by mail; (R.T.10:11-17 and R.T.19:14-17) Appellant terrorizes Respondent's girlfriend. (R.T.2:3-4) Appellant admits she is in the area where Resopndent lives and frequents in the hope that she might be able to see him. (R.T.34:1-16)

The facts of this case differ sharply from the ones in Smith v.Silvey, cited by Appellant, where the court even

questioned whether the fact situation presented was an appropriate one for an action under Code of Civil Procedure section 527.6. Smith v. Silvey (1983) 149 Cal.App.3d 400, 404. Defendant Silvey's exercise of his constitutionally protected right to petition government agencies for redress of grievances and to contact others involved in these specific grievances cannot be compared with Appellant's continual personal harassment of Respondent and those with whom he associates. Appellant has no legitimate purpose underlying her contacts with Respondent or his girlfriend, or his housekeeper or business associates. She has no grievance to address. Appellant has a fantasy that Respondent is attracted to her (R.T.30:22-23) and therefore she is justified in

interfering in his life.

Because Appellant contacts friends and neighbors of Respondent solely for the purpose of making indirect contact with Respondent himself by asking that these individuals pass messages to Respondent, there are no fundamental rights of expression to be protected. Appellant's contention that she **[9/10]** cannnot ascertain whom she is supposed to avoid making contact with is not borne out by the record. The record clearly indicates that Appellant is aware of those individuals who are close enough to Respondent to afford her another avenue for harassment. Appelant's own testimony identified Respondent's girlfriend as Paula and "I am just curious to talk because she know him." (R.T.52 20-21).

Appellant has no constitutionally

protected message that relates to the free flow of communication and ideas to transmit to this specific group of identifiable individuals who are in [sic] connected to Respondent. The original order which was not modified by the order being appealed from states that she is not to contact these indivduals for any purpose having to do with Plaintiff. (C.T. 7) Therefore so long as Plaintiff [sic] does not approach any individual with the purpose of making indirect contact with Respondent she will not be in violation of the court order. Therefore the order sets definite identifiable limits on the behavior which is prohibited.

B. The trial court was required to balance Respondent's constitutionally protected rights of privacy with Appellants [sic] First Amendment Rights

of free speech and association.

Freedom of speech and the right to associate freely are guaranteed by both the federal and state constitutions. (U.S. Const. 1st and 14th Amends; Cal. Const. Art. I sec.2.) However, First Amendment rights are not absolute or unlimited. Alternatives For California Women, Inc. v. County **[10/11]** of Contra Costa (1983) 145 Cal.App.3d 436, 448. Respondent's right to privacy rises to the same constitutionally protected stature as Appellant's First Amendment rights by virtue of California Constitution Article I section 1.

Where two competing constitutionally protected rights are in conflict, the court must balance the competing interests and any order which infringes on one right must be couched in the narrowest terms which will

accomplish the pinpointed objective permitted.

> "A court must weigh the extent of the impairment against both the importance of the governmental interest and the substantiality of the threat which the forbidden speech or related activity poses to that interest."
>
> California Retail Liquor Dealers Institute vs. United Farm Workers (1976) 57 Cal.App.3d 606, 611.

While such regulation of protected activities must be narrowly drawn to promote compelling and substantial state interests, courts have found that residential privacy and the right of the individual to be left alone are such substantial state interests. Alternatives for California Women, Inc. vs. County of Contra Costa, supra, at P. 449.

It is questionable whether any First Amendment rights of Appellant are

even implicated in the Order of the trial court. The activities enjoined by the trial court essentially proscribes conduct and only incidentally affects speech. Any contact requires communication of some kind, so prohibiting a course of conduct inevitably has the incidental effect on communication also. But this incidental effect does not trigger the kind of First Amendment analysis applied **[11/12]** to situations aimed at communication of information and ideas. It has never been deemed an abridgement of freedom of speech to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. National Subscription Television v. Formula International, Inc. (1983) 153

Cal.App.3d 308, 313.

Appellant's course of conduct harassing Respondent does not rise to the level of constitutionally protected behavior. Appellant's activities in attempting to insinuate herself in Respondent's life are a "serious substantive evil" infringing on Respondent's right of privacy interest which has an equal dignity and protection with First Amendment rights. Smith vs. Silvery [sic], supra, at p. 407.

A court order fashioned according to the circumstances of the case generally stands on a different footing and is not to be judged on the same standards as an [sic] statute or ordinance which define the permissible scope of free speech in the abstract. California Retail Liquor Dealers

Institute v. United Farm Workers (1976) 57 Cal.App.3d 606, 611.

The present record adequately justifies the restrictions imposed on Appellant by the trial court. The restrictions are not so severe that Appellant will be unable to move freely about the area: she can shop in Santa Cruz, pick up her mail in Santa Cruz, walk on a beach in Santa Cruz, and communicate with anyone so long as she does not attempt to use that communication to contact or harass Respondent. Appellant lives in the City of Santa Cruz and **[12/13]** has no legitimate business in Respondent's neighborhood. By allowing Respondent a neutral harassment-free zone encompassing his home and his neighborhood, the court has effectively protected Respondent's legitimate right

to be left alone without any serious encroachment on Appellants [sic] freedom of speech or movement.

The order of the trial court is as narrowly restrictive as the long-term illegal conduct of Appellant allows it to be.

CONCLUSION

The purported appeal from the contempt order must be dismissed, and the modification order should be affirmed.

Respectfully submitted.

Dated: September 9, 1987

/s/ [Austin B. Comstock]
AUSTIN B. COMSTOCK

[Pagination of the original Petition for Rehearing will be indicated at page turning point by printing respective page numbers in bold brackets, e.g. **[1/2]**.]

FILED

APR 8 - 1988

Court of Appeal - Sixth App. Dist.
RICHARD J. EYMAN, Clerk

By _____ DEPUTY

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MICHAEL MARSDEN aka MICHAEL MARSTEN Plaintiff and Respondent, BARBARA SCULLEN aka BRANKA SCULLEN [sic] Defendant and Appellant.	)	NO. H003153 (Santa Cruz Superior Court No. 9781)

PETITION FOR REHEARING

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[cover/i]

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IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MICHAEL MARSDEN aka MICHAEL MARSTEN[1]	NO. H003153
Plaintiff and Respondent,	(Santa Cruz Superior Court No. 9781)
BARBARA SCULLEN aka BRANKA SCULLEN [sic]	PETITION FOR REHEARING
Defendant and Appellant.	

1. It appears that the correct surname of Respondent is "Marsten." However, his counsel filed the initial pleadings and various other papers in the Superior court under the name "Marsden." The Clerk's Transcript accordingly used the name "Marsden." This Court used the name "Marsden" in the caption of its opinion. On the other hand, Respondent's signature appears to be "Marsten." The later pleadings by Respondent in the trial court reflect

[footnote continued on next page]

THE RULING OF THIS COURT IN PART WAS THE RESULT OF A FOCUS ON THE LANGUAGE OF THE WRONG ORDER, WITH THE PREFERABLE REMEDY BEING A MODIFICATION OF THE INSTANT ORDER TO CONFORM TO THE LANGUAGE PURPORTED TO BE AT ISSUE BY RESPONDENT.

It appears that the erroneous representation of the record by Respondent in his brief misled the Court of Appeal as to an important issue, and that a correction of that error would lead **[unnumbered first page/2]** toeither [sic] a partial reversal of the Order appealed from, or alternatively affirmation of such order upon modification of the same. The fact that Appellant is confining her argument in

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[continued from previous page] "Marsten" The Respondent's Brief in this Court uses the name "Marsten." No issue turns on this discrepency of the spelling of the Respondent's name.

this rehearing petition to this single point is not intended by her to be an abandonment of the other contentions which were raised and ruled upon by this Court earlier, and which are still subject to review.

The particular misreprentation that is claimed to be material is the following:

> The original order which was not modified by the order being appealed from states that she is not to contact these individuals for any purpose having to do with Plaintiff. (C.T. 7) Therefore so long as Plaintiff does not approach any individual with the purpose of making indirect contact with Respondent she will not be in violation of the court order.
>
> Respondent's Brief, page 10, lines 11-17.

Technically, the factual representations of the first sentence are literally correct. However, the inference drawn takes advantage of the obfuscation contained within the form of the

representation.

The correct state of the record appears by a close examination of the Clerk's Transcript - hereinafter designated "CT.") [sic] There were in fact three distinct proscriptive orders (disregarding the second order to show cause, which was unaccompanied by a temporary restraining order). The first of these (labeled the "original order" in Respondent's Brief) was the Temporary Restraining Order that accompanied the initial Order to Show Cause dated May 8, 1986. (CT 6-7.) The operative phrase in question reads:

> Refrain from contacting any of plaintiff's friends, employees, or neighbors **for any purpose having to do [2/3] with plaintiff.**
>
> (CT 7. Emphasis added.)

The second order was the Order After Hearing on Petition for Injunction Prohibiting Harassment filed May 22,

1986. (CT 13-14.) Although the Clerk's Minutes reflect that "The Court grants its orders as prayed," CT 12, the May 22, 1986 Order After Hearing on Petition for Injunction Prohibiting Harassment **did** modify the temporary restraining order in the respect now in focus. It read as follows:

> Refrain from:
>
> (1) Sending messages to plaintiff through the mail;
>
> (2) Contacting plaintiff's neighbors, housekeeper and friends.

CT 14.

No longer was the ban on "contacting plaintiff's neighbors ... and friends" limited to those contacts pertaining to Respondent. It was now in the form of a general ban, as devoid of specific intent as the ban from the vicinity of Respondent's residence.

The third order, an Order After

Hearing on Petition for Injunction Prohibiting Harassment filed May 5, 1987, which is labeled "the order being appealed from" in Respondent's Brief, uses in pertinent part the language of the second order, to wit:

> Defendant shall refrain from (1) sending messages to plaintiff through the mail; (2) contacting plaintiff's neighbors, housekeeper and friends; (3) ...

CT 30.

Thus we see that the representation that "the orginal [sic] order ... was not modified by the order being appealed from" is technically correct only in the sense that such original order had already **[3/4]** been modified by the second order and that the "order being appealed from" merely followed the pattern of that second order. That is **not** the equivalent of the claim that the

original order was unchanged and is essentially reflected in the order being appealed from.

The opinion of this Court reflected an analysis that assumed that specific intent element was contained in the present injunction. The opinion reads on page 4 as follows:

> Making unwanted indirect contact with someone through his friends and neighbors is not the exercising of one's right to free speech or association.

However much that may be a correct description of the original temporary restraining order, it does not address the broad, indeed overbroad, constraints of the instant order. Police in the field will not have an appellate gloss with which to interpret the meaning of the order. They will read it on its face, and under such order Ms. Scullen can be subject at least to arrest for

mere contact with any of Mr. Marsten's friends or neighbors, regardless of whether Mr. Marsten is in any way the object of direct or indirect comment, allusion or reference, and regardless of whether there is any attempt to use such person as a means to convey a communication to Mr. Marsten.

The overbreadth of the order is not innocuous. The harm is illustrated by the record on appeal. Respondent's declaration filed May 8, 1986 acknowledged that Appellant used to work as a nurse for a neighbor of his. (CT 3, lines 18-19.) there is no evidence in the record that Ms. Scullen ever used this particular relationship to harass Mr. Marsten or attempted to communicate with Mr. Marsten through her former employer. Yet the terms of **[4/5]** the instant injunction prevent her from

making contact with her former employer for any purpose whatsoever.

Furthermore, Ms. Scullen testified that she used to live on Seacliff Drive . (Reporter's Transcript - hereinafter "RT" -28:4-5.) There is a statement that she used the Seacliff Beach for 10 years when she was living there, but there is some ambiguity whether the 10-year period refers to the length of her residency on Seacliff Drive or only the duration of her use of Seacliff Beach. She also testified

> I lived in that street about two years. I was a nurse for Miss Field.
>
> RT 28:10-11.

While there is ambiguity as to whether Ms. Scullen lived in the area for 2, 10 or 12 years, and as to whether she was a live-in nurse for Mr. Marsten's neighbor, Miss Field, or merely worked

as a visiting nurse, the record is clear that she and Mr. Marsten shared neighbors for a substantial period of time. Mr. Marsten's neighbors were also once Ms. Scullen's neighbors. There is nothing in the record to dispel the conclusion that among such people she too has friendships and/or acquaintenceships that can be cultivated without any reference to Mr. Marsten whatsoever. (Judge Kelsay acknowledged his personal familiarity with the area, RT 26:18-19, and so could take judicial notice of the fact that Seacliff Avenue was in the vicinity of Seacliff Beach, Seacliff State Park and Las Olas Drive, where Mr. Marsten lived.)

Nor is the instant order nonprejudicial merely because it **[5/6]** repeats the terms of the second 1986 order. As noted by counsel for

Respondent at the trial the earlier order was due to expire in May 1989. RT 44:11-12. the instant order extends its terms.

It would seem that a remedy that would be consistent with the Court's analysis of the issues, and yet corresponding to the actual state of the record, would be to modify the Order After Hearing on Petition for Injunction Prohibiting Harssment filed May 5, 1987 to make item # 2 of "OTHER ORDERS" read as it did in the original temporary restraining order, to wit:

> Refrain from contacting any of plaintiff's friends, employees, or neighbors **for any purpose having to do with plaintiff.**
>
> (Emphasis added.)

That was the actual order defended by Respondent and impliedly approved by this Court, and it is appropriate that the Order should be limited to those

terms. An alternative remedy would be to require that the Order read as suggested here commencing May 22, 1989 so as to allow the 1986 Order, which was not appealed from, to run its course.

Such a modification would avoid the very serious impingement of associational rights protected by the First and Fourteenth Amendments to the United States Constitution and Article I, § 2(a) of the California Constitution that would be inflicted by absolutely preventing contact with one's former neighbors and other acquaintances who may happen to be friends and neighbors of Mr. Marsten.

Dated: April 8, 1988.

/s/ [Raymond C. Grueneich]
Raymond C. Grueneich
Attorney for Appellant upon
Petition for Rehearing

[Pagination of the original Petition for Review will be indicated at page turning point by printing respective page numbers in bold brackets, e.g. **[1/2]**.]

SUPREME COURT
FILED

MAY 3 1988

Lawrence P. Gill,
Clerk

_____
DEPUTY

IN THE SUPREME COURT OF CALIFORNIA

MICHAEL MARSDEN aka MICHAEL MARSTEN	)	NO. S005515
Plaintiff and Respondent,	)	(Court of Appeal, Sixth Appellate District No. H003153)
BARBARA SCULLEN aka BRANKA SCULLEN [sic]	)	(Santa Cruz Superior Court No. 9781)
Defendant and Appellant.	)	

PETITION FOR REVIEW

of the May 5, 1987 order of the Honorable William M. Kelsay of the Superior Court for the County of Santa Cruz in the case of Marsten vs. Scullen [sic] (97871).

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BARBARA SCULLEN [sic]

[cover/i]

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2. The Superior Court does not have the authority in a harassment proceeding pursuant to Code of Civil Procedure § 527.6 to enjoin conduct that is subject to some degree of constitutional protection, even if such constitutional protection is not absolute and subject to a constitutional balancing test. 20

3. The order of the Superior Court restraining Defendant

from having any contact for any purpose with any friends or neighbors or Plaintiff, which persons are also the former neighbors of Defendant, is overbroad and thus is a violation of the rights of free association protected by
(a) the First Amendment to the United States Constitution;
(b) Article I, § 2(a) of the California Constitution; and
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SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL MARSDEN aka MICHAEL MARSTEN[1]	NO. S005515
Plaintiff and Respondent,	(Court of Appeal, Sixth Appellate District No. H003153)
BARBARA SCULLEN aka BRANKA SCULLEN [sic])	
Defendant and Appellant.	(Santa Cruz Superior Court No. 9781)

PETITION FOR REVIEW

---

1. It appears that the correct surname of Respondent is "Marsten." However, his counsel filed the initial pleadings and various other papers in the Superior court under the name "Marsden." The Clerk's Transcript accordingly used the name "Marsden." This Court used the name "Marsden" in the caption of its opinion. On the other hand, Respondent's signature appears to be "Marsten." The later pleadings by Respondent in the trial court reflect "Marsten" The Respondent's Brief in this Court uses the name "Marsten."

[footnote continued on next page]

STATEMENT OF THE ISSUES

1. The Superior Court does not have the authority in a harassment proceeding pursuant to Code of Civil Procedure § 527.6 to enjoin conduct that was not part of "the course of conduct" constituting harassment, even if the prevention of such conduct might have a reasonable relationship to preventing the possibility of future harassment or obfuscation of whether harassment is about **[1/2]** to occur.

2. The Superior Court does not have the authority in a harassment proceeding pursuant to Code of Civil Procedure § 527.6 to enjoin conduct that is subject to some degree of constitutional protection, even if such constitutional protection is not

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[continued from previous page]
No issue turns on this discrepency of the spelling of the Respondent's name.

absolute and subject to a constitutional balancing test.

3. The order of the Superior Court restraining Defendant from having any contact for any purpose with any friends or neighbors or [sic - of] Plaintiff, which persons are also the former neighbors of Defendant, is overbroad and thus is a violation of the rights of free association protected by

(a) the First Amendment to the United States Constitution;

(b) Article I, § 2(a) of the California Constitution; and

(c) the proper exercise of equitable discretion.

STATEMENT OF THE CASE

On May 8, 1986 Plaintiff and Respondent MICHAEL MARSTEN (hereinafter MARSTEN) filed in Santa Cruz Superior

Court a Petition for Injunction Prohibiting Harassment with an Application for Temporary Restraining Order against Defendant and Appellant BARBARA SCULLEN aka BRANKA SCULLEN [sic] (hereinafter SCULLEN). (Clerk's Transcript - hereinafter "CT" - 1-5.) (Counsel for MARSTEN filed said Petition under the name of Marsden, which was also done with respect to various other papers in this case. See footnote 1 in the margin. Hereafter in this brief I will disregard the discrepency between Marsden and Marsten and consistently refer to the Respondent as MARSTEN, regardless of which name appears in the particular document under discussion.) Said case was assigned docket number 97871. On that same date (May 8,1986) Judge **[2/3]** Christopher C. Cottle signed an Order to Show Cause and Temporary

Restraining Order. (CT 6-7.) Said Temporary Restraining Order included the following provisions directed to SCULLEN:

> Refrain from sending [MARSTEN] messages of any description, whether by regular mail or otherwise.
>
> Refrain from contacting any of [MARSTEN's] friends, employees, or neighbors for any purpose having to do with [MARSTEN].
>
> CT 7 [Bracketed words so appear in original Petition for Review.]

On May 19, 1986 SCULLEN filed her Response to Petition for Injunction Prohibiting Harassment. (CT 10-11.) The hearing on said Petition occured on May 21, 1986 before Judge Cottle. (CT 12.) On May 22, 1986 Judge Cottle signed an Order After Hearing on Petition for Injunction Prohibiting Harassment, which was filed that same day. (CT 13-14.) Said May 22, 1986 order included the following provisions

restraining SCULLEN:

> Refrain from:
>
> (1) Sending messages to [MARSTEN] through the mail;
>
> (2) Contacting [MARSTEN's] neighbors, housekeeper and friends.
>
> CT 14. [Bracketed words so appear in original Petition for Review.]

On March 6, 1987 MARSTEN filed a Petition for Amended Injunction Prohibiting Harassment against SCULLEN in the same case. (CT 15-17.) On the same date MARSTEN presented to the Superior Court an Order to Show Cause In Re Contempt and to Modify Existing Injunction. (CT 22-23.) Declarations in support of the petition for amended injunction and contempt citation were filed **[3/4]** with them by MARSTEN, CT 18[2]-19, and his counsel. CT 20-21.

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2. The page between pages 18 and 19 in the Clerk's Transcript is unnumbered, [note continued on next page]

The Order to Show Cause was signed on March 6, 1987 by Judge William M. Kelsay, and filed that same date. (CT 22-23.) The hearing regarding the petition for amended injunction (and the contempt charge) occurred on March 31, 1987 before Judge Kelsay. (CT 26.) SCULLEN elected to testify at such hearing. (CT 26.) At the conclusion of the hearing there was discussion concerning the proper scope of the amended injunction. Mr. Comstock, counsel for MARSTEN, requested that all of the terms of the previous order continue in effect, in addition to the new restrictions concerning the vicinity of Seacliff State Park, and access to the

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[note continued from previous page] but clearly is the second page of the Declaration of Plaintiff in Support of Contempt and Amendment Proceedings, which begins on page 18. Reference to this page will be as page 18A of the Clerk's Transcript or "CT:18A."

Aptos Post Office and the Rancho Del Mar Shopping Center. In particular Comstock argued for a continuation of the order that SCULLEN not have "[c]ontact with other people having direct contact with [MARSTEN]." (RT 50:2-7. [Bracketed letter and word so appear in original Petition for Review.) Grueneich expressed his "concern" with "those just iterated" with respect to "some of the vagueness about with friends and et cetera." (RT 50:17-20.) An Order After Hearing on Petition for Injunction Prohibiting Harassment was signed by Judge Kelsay and filed on May 5, 1987. CT 29-30. (This document has the same title as the document filed on May 22, 1986.) The May 5, 1987 order included the following provisions restraining

SCULLEN:

[4/5]

> [SCULLEN] shall refrain from
>
> (1) sending messages to [MARSTEN] through the mail;
>
> (2) contacting [MARSTEN's] neighbors, housekeeper and friends;
>
> (3) being 100 yards from the entry of Seacliff State Park;
>
> (4) refrain from being within the boundary of Seacliff State Park, Aptos, California;
>
> (5) refrain from being at the Aptos Post Office of the Rancho Del Mar Shopping Center after the hour of 10:30 a.m.; [sic]
>
> CT 30. [Bracketed words, except for final "sic," so appear in the original Petition for Review. The final "sic" refers to fact that final punctuation of quote shown in original Petition for Review was a semicolon rather than a bracketed period.]

Judge Kelsay also found SCULLEN to be in contempt of the May 22, 1986 order. (CT 27-28.)

SCULLEN filed a Notice of Appeal on May 29, 1987 from the "ORDER AFTER

HEARING ON PETITION FOR INJUCTION [sic] PROHIBITING HARRASSMENT [sic] entered herein on May 1 [sic[3]], 1987." CT 31. [All the "sic" notations associated with this last quote appear in original Petition for Review.] The Court of Appeal for the Sixth Appellate District assigned the c**[5/6]**ase [this word was split between the 5th and 6th pages of the original Petition for Review] docket

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3. The order at issue was filed on May 5, 1987. It is not clear when Judge Kelsay signed it, although the Court of Appeal incorrectly surmised it to be on May 1, 1987. May 1, 1987 is the date upon which SCULLEN's then, and now again, counsel Raymond C. Grueneich, "[a]pproved [bracketed letter so appears in original Petition for Review] [the May 5, 1987 order - this bracketed addition so appears in original Petition for Review] as to form and content, 1987. [sic - lack of end quotation marks and inadvertent inclusion of ", 1987"] CT:31. The May 1, 1987 date was initially entered in the space for the date corresponding to the Judge's signature by Grueneich, and then crossed out and reinserted below in the date space corresponding to counsel's signature.

number H003153. SCULLEN briefed[4] issues concerning both said May 5, 1987 order and the contempt conviction. The Court of Appeal treated the appeal as having been taken from the order of Judge Kelsay filed May 5, 1987 with an unpublished opinion filed March 24, 1988. (Footnote 2 of the Court of Appeal opinion - hereinafter "OP", which opinion appears as an Appendix to this Petition for Review.) The Court of Appeal affirmed the May 5, 1987 order of the Superior Court. (OP 5) The Court of Appeal also declined to adjudicate any issue concerning the contempt conviction. (OP footnote 2.) Present counsel filed a Petition for Rehearing

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4. At the time of the briefing and oral argument (until the Petition for Rehearing) SCULLEN appeared in propria persona, but was informally assisted in that endeavor by counsel other than present counsel.

on April 8, 1988. Said Petition for Rehearing was denied on April 15, 1988.

STATEMENT OF THE FACTS

MARSTEN testified that SCULLEN followed him "every day." (Reporter's Transcript - hereinafter "RT" - 7:25-8:3.) He described the course of this conduct as commencing with her parking her car at the parking lot of Seacliff State Park at various times of the day and night. (RT 8:5-6; MD2CT 25-28.) MARSTEN stated that when SCULLEN's car is parked there, SCULLEN is usually either in her vehicle or within 30-40 feet of it, and that he had never seen her go down by the beach area to bathe, run or jog. (RT 13:26-14:15.) MARSTEN alleged that when he goes by this **[5/6]** point on his way to Aptos, she follows him into Aptos, and wherever he goes, "she's there." (RT 8:4-8; 8:15-17;

MD2CT 18.) The route so travelled by the Seacliff State Park is the only access to MARSTEN's home. (RT 8:12-14; Decaration of Plaintiff in Support of Contempt and Amendment Proceedings - hereinafter "MD2CT" for second MARSTEN Declaration, in Clerk's Transcript - 18:21-23.) MARSTEN testified that the surveillance complained of on a daily basis included the Aptos Post Office. [sic] (RT 8:8-15;MD2CT 18:23-25.) MARSTEN also asserted that this daily tandem included a journey to "the store." (RT 8:8-12; MD2CT 18:23-25.) The identity of "the store" was not specified. It is not clear whether "the store" refers to a particular store or is a generic term meaning any store that he happens to be shopping at on the occasion in question. Supporting the latter inference is the phrasing used by

MARSTEN at one point of "whatever store I'm going to." (RT 16:10-12.) The location of "the store" is designated as being in Rancho Del Mar[5] Shopping Center. (RT 17:12-18.) MARSTEN acknowledged that for approximately two years he had frequented the Aptos Post Office and did his shopping at a fairly regular **[7/8]** time each day, "[g]enerally between, oh, 10:00 [a.m.], 10:30 [a.m.], quarter to 11:00 [a.m.], something like this." (RT 17:10-26-18:10. Quotation appears at RT 17:22-23. [Bracketed material so appears in

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5. MARSTEN initially identified the shopping center as "Rancho Shopping Center." (RT 17:12-16.) Judge Kelsay, who is very familiar with the area from having previously lived in the vicinity for a number of years (RT 6:12-7:1; 11:22-23; 13:15-18) and who still "routinely" hiked in the area of the Seacliff State Park (RT 26:18-19), corrected him and provided the name Rancho Del Mar Shopping Center. MARSTEN ratified the correction. (RT 17:18.)

original Petition for Review.]) MARSTEN recited that at least on one occasion, which was not further specified, SCULLEN was "within inches" of him. (RT 10:3-7.) He also testified that "occasionally" SCULLEN has "contacted [MARSTEN] or talked with him." (RT 10:8-10. [Bracketed word so appears in original Petition for Review.]) There is no indication in the record regarding the substance or demeanor of this conversation of hers. MARSTEN did say that there was an occasion in the Aptos Post Office when SCULLEN said something to him which he does not remember, and that he replied that he would try to have her arrested. (RT 14:22-24.)

MARSTEN received a note dated March 2, 1987, which was mailed to him by SCULLEN. (RT 10:11-18; RT 33:13-14; MDCT 18A:5-11.) That note read as

follows:

N-O-T-E

> Just for your peace of mind, I agree to sign this note or agreement which explains, weather [sic - this notation in original Petition for Review] I would be married to Mr. Michael Marsten or just living together, I would not file any financial law suit for a settlement, [sic - punctuation -- this notation in original Petition for Review] It would simply be the way he thinks that's right and honest.
>
> I'm doing this on my own behalf and it will serve to Mr. Michael Marsten as a legal document.
>
> /s/
> Branka Scullen [sic - the note actually contained the correct spelling of "Scullin"]
>
> 03/02/87
>
> CT 19.

MARSTEN testified that he had received hundreds of letters from SCULLEN. (RT 19:14-16.) He remarked that he had even purchased a stamp that said "Return to Sender" so that he could **[8/9]** use it on SCULLEN's mail to him.

(RT 19:17-19.) However, there was no testimony that any of these letters except for the one appearing at CT 19 and entirely quoted above had been received since the May 8, 1986 Temporary Restraining Order. MARSTEN testified that "this has been going on seven and a half years or something like that." (RT 20:3-4.)

The Declaration of MARSTEN claimed that on February 16, presumably of 1987, SCULLEN had made "verbal threats" to his "girlfriend" when she was "visiting his home." (MD2CT 18A:1-3; RT 20:7-9.) There was no indication that MARSTEN was present at the time of this alleged event or that he has anything but hearsay knowledge of it. There was no testimony regarding the alleged incident at the hearing, except a brief allusion to his identifying the occasion of the

conversation which he had had with SCULLEN as being "right after [SCULLEN] had terrorized [MARSTEN's] girlfriend." (RT 20:7-9. [Bracketed words so appear in original Petition for Review.])

In his May 8, 1986 declaration (the declaration filed with the original petition) MARSTEN alleged that SCULLEN had been "annoying [his] neighbors, [his] friends, and generally making a nuisance without any legitimate purpose. (CT 3:19-24. [Each bracketed "his" so appears in the original Petition for Review, as does the emphasis within the date and the lack of end quotation.]) No particular conduct is described in such declaration which would merit this characterization with respect to MARSTEN's friends or neighbors.

Mr. Smeenk, a building contractor, testified that he had been in the

vicinity about 20 times since May 1986, and that he had seen SCULLEN there 3 or 4 times in the Seacliff State Park parking lot. (RT 21:16-20; 23:23-24:3.) Smeenk also stated that he had seen SCULLEN at the Aptos Post Office during that period, although **[9/10]** there was no indication that it was at a time that MARSTEN was frequenting the post office. (RT 21:22.) And Smeenk also saw SCULLEN "on the road" "in the vicinity" although again no connection with MARSTEN's presence was indicated. (RT 21:23-25.)

Smeenk testified that he had done work for MARSTEN "over a period of years." (RT 21:3-5.) Apparently, Smeenk's hearsay testimony that his (Smeenk's) brother had reported to him that various calls had been received by the brother from SCULLEN asking for Smeek to contact her was struck by the

trial court. (RT 22:5-2[10/11]3:22.)[6]

[The page number "23" in this citation was split between two pages in the original Petition for Review.]

SCULLEN denied that she had

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6. Smeenk testified on direct examination that he had not had any conversations with SCULLEN but that she had left messages for him "with [Smeenk's] company." (RT 22:7-8. [Bracketed word so appears in original Petition for Review.]) At this point the hearsay nature of the testimony is not yet clarified since such messages may well have been left on an answering machine. During cross-examination Smeenk testified that the messages were taken by his brother. (RT 22:17-18.) After this bit of cross-examination Smeenk testified that the messages were taken by his brother. (RT 22:14-17.) Smeenk said that his brother's telephone number appears on the side of his (Smeenk's) business vehicles. (RT 22:17-18.) After this bit of cross-examination Grueneich (SCULLEN's counsel) moved to strike the testimony as hearsay. (RT 23:1-2.) Judge Kelsay initially overruled this objection. (RT 23:3.) However, the Court pursued further voir dire on the point and inquired if Smeenk's brother wrote down the messages when he received them. (RT 23:11-12.) Smeenk testified

[note continued on next page]

ever followed MARSTEN. (RT 25:25-

[note continued from previous page]
somewhat equivocally that

> [His brother] may have. ... He may have written it all down. He normally does do things like that. I don't think we have a record of it.
>
> (RT:13-16. [Bracketed words and elision so appear in original Petition for Reveiw.])

Grueneich then further argued that he "didn't think we have a record" that met business records exception to the hearsay rule. (RT 23:17-19.) (Grueneich misarticulated his argument in the double negative:

> I don't think we have a record that's the exception to the business records exception.
>
> RT 23:17-19.) [sic - opening parentheses missing in original Petition for Review]

Notwithstanding, the gist of SCULLEN's objection was clear. Judge Kelsay apparently agreed with the evidentiary point of SCULLEN at this point, and announced "We don't." (RT 23:20.) This finding of a lack of establishing the requisite reliability for the business records exception is an implied ruling that the hearsay testimony be struck. Further reinforcing that this was the

[note continues on next page]

[11/12]26; 32:4-5; 46:3-4; 46:7.) SCULLEN also denied that she had ever acted with malice toward MARSTEN. (RT 30:23-24; 31:24-25). SCULLEN further denied that she had ever threatened MARSTEN's girlfirend. (RT 52:7-9.) SCULLEN did acknowledge that she had parked her car in the Seacliff State Park parking lot. (RT 26:16-17.) She asserted that she had been exercising on that beach for some 10 years and as a matter of weight control

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[note continued from previous page] meaning of the trial court's comment is that it was immediately followed with the following countervailing chide:

> **But** Mr. Grueneich, ask your client if she's called him, for crying out loud.
>
> RT 23:20-22. [Emphasis in original Petition for Review.]

The trial court apparently momentarily lost perspective of the fact that the hearing was also a quasi-criminal contempt trial at which the defendant had not yet elected to take the stand.

she liked to have a morning and an afternoon walk there. (RT 28:2-14.) However, she explained that since the "restraining order"[7] she had been afraid to do much walking in the area, so she mostly just parked there and read a paper or magazine. (RT 28:23-29:3.) She acknowledged that sometimes she would get out of the car, walk around a little bit to "get fresh air." (RT 29:1-3.) SCULLEN also testified that she used to live on that street. (RT 28:2) (In her May 19, 1986 declaration SCULLEN asserted that she had "lived on the same short street" "[f]rom 1979 to 1981." (CT 10. [Bracketed letter so appears in the original Petition for Review.))

SCULLEN testified that although her personal mail was delivered to a post

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7. This is presumably a reference to the May 8, 1986 temporary restraining order.

office box in Santa Cruz (RT 37:10; 37:15-17), she regularly picked up mail at the Aptos Post Office for a friend who had been in Hong Kong for about a year. (RT 37:10-12; 37:18-25.) She testified that noone else was available to pick up their mail. (RT 37:24-38:1)

SCULLEN did admit that she had "overheard or somebody told **[12/13]** [her]" that MARSTEN preferred SCULLEN over his girlfriend. (RT 33:6-10. [Bracketed word so appears in original Petition for Review.]) SCULLEN also claimed to know that MARSTEN was "influenced by his friends." (RT 33:4-5.)

SCULLEN acknowledged that she had sent MARSTEN "that note," which presumably refers to the note found at CT 19. (RT 33:13-14.)

[13/14]

ARGUMENT

1. THE SUPERIOR COURT DOES NOT HAVE THE AUTHORITY IN A HARASSMENT PROCEEDING PURSUANT TO CODE OF CIVIL PROCEDURE § 527.6 TO ENJOIN CONDUCT THAT WAS NOT PART OF "THE COURSE OF CONDUCT" CONSTITUTING HARASSMENT, EVEN IF THE PREVENTION OF SUCH CONDUCT MIGHT HAVE A REASONABLE RELATIONSHIP TO PREVENTING THE POSSIBILITY OF FUTURE HARASSMENT OR OBFUSCATION OF WHETHER HARASSMENT IS ABOUT TO OCCUR.

A harassment proceeding pursuant to California Code of Civil Procedure § 527.6 is not a suit at law nor is it an opportunity for the parties to invite a general roaming of judicial discretion to serve equity. It is a discrete statutory proceeding intended to serve a particular serious class of problems in a flexible, but not totally undefined manner.

This principle is well illustrated by Marquez-Luque v. Marquez (1987) 192 Cal.App.3d 1513, ____ Cal.Rptr. ____. In that case the defendant had engaged

in harassment and threats of certain relatives who were also the executor and alternative executor of the defendant's (and executor's) late father's estate. The trial court found in a CCP § 527.6 action that the defendant had threatened to burn down the house in which he was living, which had been the father's house, if the estate attempted to sell the house and evict him. The trial court granted affirmative injunctive relief requiring eviction of the defendant forthwith. Marquez-Luque ruled that such could not be accomplished in a CCP § 527.6 proceeding, but that the estate would need to resort to an unlawful detainer action, or alternatively a common law remedy, where the defendant could have his right to a jury trial to dispute material issues of fact. The

restriction found in Marquez-Luque to govern the case was that the nature of the harm threatened, i.e., the wanton and malicious destruction of property **[14/15]** allegedly belonging to the estate, was not the kind of harm against which the harassment proceeding was designed to afford protection.

In the instant case, the nature of one of the harms, i.e., freedom from invasion of privacy, is within the realm of the statute's intended field. Other harms, such as freedom of reputation from defamatory detraction, may not be. A significant difficulty with the May 5, 1987 order of the Superior Court is that the remedy utilized did not confine itself to the statutorily authorized remedy.

Subsection (d) of CCP 527.6 is very explicit regarding the scope of the

injunctive remedy available to the Superior Court. It states, in pertinent part as follows:

> If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting **the harassment.**
>
> (Emphasis added [in original Petition for Review.])

This is **not** the equivalent of the following:

> If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment **and may also enjoin any other conduct which could reasonably tend to provide opportunity for harassment.**
>
> [Emphasis in original Petition for Review.]

Whether the latter power might inhere within a general court of equity is not the point. A case permitting the general exercise of the court's full equity powers also provides a different procedural framework in which the

interests of the parties can be developed. The harassment proceeding of CCP § 527.6 is intended to give quick relief to an acute need by compelling an end to actual harassment. An application for the more general exercise of the equity powers of the court would give the defendant an **[15/16]** opportunity not only for a hearing following approximately 15 days, which from a trial practice perspective is essentially equivalent to a hearing on an application for preliminary injunction, but would also provide for a full-dress trial, albeit not before a jury, which could follow ample discovery, before the issuance of a long-term injunction. Although it can be argued that the 3-year harassment injunction resulting from a CCP § 527.6 proceeding has a life comparable to the

preliminary injunction in some long-pending cases, that is likewise not the point. This is not an occasion for applying constitutional equal protection analysis to see if a legislative judgment should be overturned by treating disparate measures as if they were essentially the same. It is rather an occasion for **applying** the judgment already expressed by the legislature in the clear terms of the statute. [Emphasis in original Petition for Review.] There are sufficient differences between the preliminary injunction of general equity court and the 3-year injunction of the harassment proceeding to justify the legislative restrictions that have been put in place by CCP § 527.6.

The legislature has given us the definition of "harassment" which it

intends the trial court to apply in a § 527.6 proceeding. That definition, appearing in subsection (b) follows:

> For the purposes of this section [527.6], "harassment" is a knowing and wilful [sic - the statute uses the alternate spelling: "willful"] course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff. "Course of conduct" is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."
>
> [Bracketed number appears in original Petition for Review.]

[16/17] Thus, the issue is what is within the "course of conduct" in the context of this case.

The trial court credited the testimony of the plaintiff and also

giving effect to various admissions of the defendant, unequivocally found a "course of conduct" amounting to "harassment" in the instant case. Nor can it be disputed that such finding is amply supported by the record. However, it must be noted what that "course of conduct" was. The course of conduct shown by the evidence credited by the trial court consited of the defendant parking within the vicinity of plaintiff's home, from which vantage point she could surveil his only access to town, and then following him as he conducted his errands to the local post office and shopping center. Although bitterly resented by the defendant, defendant's counsel concedes that upon the instant record the trial court lawfully could, as it did, enjoin her from being in the vicinity of

plaintiff's home, the park which gave her a vantage point to plaintiff's access route, the post office and the shopping center. (Actually, the trial court, commendably did not bar her completely from the shopping center and post office, but rather merely restricted her hours of access there.)

However, the concession of the previous paragraph does not warrant enjoining conduct that does not fall within the "course of conduct" comprising the "harassment" in this case. (The quotation marks surround the term "harassment" to emphasize that it is being used in the special sense as defined by CCP § 527.6(b), not to deride or stand aloof from the trial court's characterization of the conduct described in the previous paragraph as harassment.) Most particularly, no

course of conduct including the use of third **[17/18]** parties was proven in this case, by clear and convincing evidence, by a preponderance of evidence, or by any substantial evidence whatsoever. There were [sic] allusion in the testimony of plaintiff that the defendant had "terrorized" his girlfriend. (RT 20:7-9.) However, this was never described or substantiated or even given a foundation of personal knowledge by the witness. There was a general claim in a declaration almost one year prior to the trial that defendant had been "annoying [plaintiff's] neighbors, [his] friends, and generally making a nuisance without any particular purpose." (CT 3:19-24. [Bracketed words in original Petition for Review.]) But again this was never described, substantiated or even claimed

to be within the declarant's personal knowledge. There was hearsay evidence, apparently struck by the trial judge, see footnote 6 of this brief, that a contractor whohad [sic] done work for plaintiff had received calls from defendant at his business asking to talk with that contractor. The contractor merely speculated that he had no knowledge of any legitimate purpose why she might be calling him, but, of course, not having returned her call he could not realistically discount that it may very well have been for a bona fide business purpose. Defendant admitted that she heard (or "overheard") from somebody some news about the state of plaintiff's sentimental affections. (RT 33:6-10.) Finally, defendant also claimed to know that MARSTEN was "influenced by his friends." (RT 33:4-

5.)

Even if this last admission, coupled with the other conduct which the court found upon ample evidence to be intolerable, could support an inference that she would exploit his friends to reach plaintiff if given the opportunity, that stands on the present record as a proclivity and not as a "course of conduct."

[18/19]

Section 527.6(d) does not authorize the trial court to speculate, even upon substantial evidence, what other course of conduct might be adopted to harass a plaintiff once the actual course of conduct resorted to has been stopped, and to frame an injunction designed to avoid such alternative course of conduct.

If the defendant had actually

engaged in the kind of conduct with respect to third parties that was alluded to, such was capable of proof and adjudication in the harassment proceeding. It is not denied that the use of friends and associates could amount to a "course of conduct" comprising "harassment." But such was not the proof here. As a matter of statutory construction, the injunctive relief must be limited to the actual course of conduct proven to have comprised actual harassment.

The question presented is an extremely important one for settlement by this Court. The harassment proceeding is a crucial and oft-resorted to remedy for the protection of privacy. Often, it's resolution is handled in summary fashion, although such was not the case here. It would be very helpful

to harried trial courts to have clear guidance on this important issue of law that affects so many litigants.

[19/20]

2. THE SUPERIOR COURT DOES NOT HAVE THE AUTHORITY IN A HARASSMENT PROCEEDING PURSUANT TO CODE OF CIVIL PROCEDURE § 527.6 TO ENJOIN CONDUCT THAT IS SUBJECT TO SOME DEGREE OF CONSTITUTIONAL PROTECTION, EVEN IF SUCH CONSTITUTIONAL PROTECTION IS NOT ABSOLUTE AND SUBJECT TO A CONSTITUTIONAL BALANCING TEST.

As discussed in the preceding argument the harassment proceeding pursuant to Civil Code of Procedure § 527.6 is limited to enjoing a particular kind of "course of conduct." The nature of the "course of conduct" that may be enjoined in such a proceeding is further limited by the following provision of subsection (b):

> Constitutionally protected activity is not included within the meaning of "course of conduct."

There are two possible constructions of this language. One construction is to assume that the legislature merely intended to confirm the truism that the trial court cannot

issue an injunction that would be unconstitutional to issue. While unobjectionable, it hardly seems that the statutory language had to be expanded for something as axiomatic and central to the consciousness of judges as that.

The other construction, which is the contention of petitioner herein, is that if a particular activity is the subject of special constitutional protection than it will not be within the scope of a harassment proceeding to deal with its treatment. There is a compelling rationale that supports this interpretation. Most constitutional rights are not absolute in their nature, but rather depend on the factual context in which they are proposed to be expressed in order to determine whether they are to be allowed or may

permissibly be constrained. It is not uncommon in **[20/21]** constitutional adjudication for the court to appropriately resort to a balancing test to determine the rights of the respective parties. There has been much agonizing over the difficulty of this task and a general recognition that it can frequently call for the most delicate application of judgment. That being the case, it is entirely rational that the California legislature would wish to defer such questions to a forum that does not have the summary characteristics of the harassment proceeding.

For example, if a public figure plaintiff were to complain that he was the target of a political movement that was subjecting him to harassment by, among other things, mass picketing in

front of his private residence, he might well be entitled to injunctive relief to limit, or perhaps entirely abate the picketing at such site. However, he would not be able obtain such relief in a harassment proceeding pursuant to CCP § 527.6. The reason for this is not that the picketing is entitled to absolute constitutional protection, but rather that it sufficiently implicates sensitive constitutional values, that it should be resolved in another forum. Subsection (j) of § 527.6 is explicit that the harassment proceeding does not preempt other remedies.

Now we turn to the question of whether the freedom to contact various third parties is sufficiently implicated with constitutional import as to be subject to this restriction from a harassment proceeding. The issue is not

a simple one capable of mechanical application. An untenable extreme would be to assert that any conduct whatsoever is part of "liberty" and since "liberty" is entitled to at least the protection of due process, **[21/22]** therefore no conduct can be restrained. But to shun such an absurdity does not relieve us from the task of recognizing that there are activities, such as the picketing example just given, that is recognized as implicating constitutional values to a degree worthy of special protection.

It is commonplace that freedom of association is protected by the First Amendment and also by Article I, § 2(a) of the California Constitution. However, even this cannot be resolved by mere resort to labels. A very insightful analysis of the constitutional freedom of association is

presented by the United States Supreme Court in Roberts vs. United States Jaycees (1984) 468 U[.]S[.] 609, 82 L.Ed.2d 462, 104 S.Ct. 3244. The field is first divided between those aspects of freedom of association that tend to be personal, and those that tend to be related to political expression. 468 U.S. at 617-618. Clearly, the nature of a person's relations with former neighbors is in the former category. Then, a spectrum of analysis is suggested with respect to freedom of association of the personal sort to determine the degree to which it is constitutionally protected. At the most intense level, warranting the highest degree of constitutional protection, are those degrees of association that are extremely intimate, such as marriage and close family ties. 468 U.S. at 618-619. At the other end

of the scale are those extremely remote forms of association that one might feel with co-members of a large national organization for which there are extremely loose stipulations for association, such as was found to be true for the members of United States Jaycees. The relations that one has with **[22/23]** neighbors and former neighbors is between these extremes. Defendant argues that it is a personal tie, and not an abstract remote one. For purposes of this second argument, it is unnecessary to even resolve the question. It is enough to declare that it is a question of sufficient constitutional delicacy to be outside the ambit of a harassment proceeding. It is to another forum that the proper balancing of constitutional interests should be committed.

A significant limitation on the foregoing principle concerns the matter of unwanted association. The United States Supreme Court has ruled in various contexts that a person cannot be compelled to be subjected to undesired First Amendment expression. Rowan v. United States Post Office Department (1970) 397 U.S. 728, 25 L.Ed.2d 736, 90 S.Ct. 1484; Babbitt v. United Farm Workers National Union (1979) 442 U.S. 289, 60 L.Ed.2d 895, 99 S.Ct. 2301. To enjoin contact and communication that is undesired by the recipient is not to engage in the balancing away of First Amendment claims; it is to enjoin conduct that has no proper First Amendment weight whatsoever. Indeed, it is upon just such a principle that defendant properly can be restrained from mailing letters to plaintiff in the

instant case, as she has been.

[23/24]

3. THE ORDER OF THE SUPERIOR COURT RESTRAINING DEFENDANT FROM HAVING ANY CONTACT FOR ANY PURPOSE WITH ANY FRIENDS OR NEIGHBORS OR PLAINTIFF, WHICH PERSONS ARE ALSO THE FORMER NEIGHBORS OF DEFENDANT, IS OVERBROAD AND THUS IS A VIOLATION OF THE RIGHTS OF FREE ASSOCIATION PROTECTED BY (a) THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, (b) ARTICLE I, § 2(a) OF THE CALIFORNIA CONSTITUTION, AND (c) THE PROPER EXERCISE OF EQUITABLE DISCRETION.

If, contrary to the contentions presented in the two preceding arguments, the Court is of the view that the trial court could have restrained defendant with respect to her association with third parties who had not requested any relief from her communication, then defendant contends that the particular form of the injunctive relief granted is constitutionally overbroad in violation of the First Amendment to the United States Constitution and Article I, § 2(a) of the California Constitution, and sound principles of equitable

discretion.

Although it is acknowledged that constitutional rights of association are not absolute, it is established also that they may not be impinged any further than is required to protect the particular interests found to be sufficiently compelling to warrant their limitation. United States v. Robel (1967) 389 U.S. 258, 19 L.E.2d 508, 88 S.Ct. 419; Baird v. State Bar of Arizona (1971) 401 U.S. 1, 27 L.Ed.2d 639, 91 S.Ct. 702; Healy v. James (1972) 408 U.S. 169, 33 L.Ed.2d 266, 92 S.Ct. 2338.

The only privacy interest that plaintiff has at stake with respect to third parties is that defendant should not use those third parties to attempt to convey messages to him. It is also arguable, but not conceded by defedant, that plaintiff's reputational interests

to be protected from defamatory statements **[24/25]** to his friends and neighbors also could be protected by a CCP § 527.6 proceeding. It is clear that all that is necessary to protect both of these interests is a proscription on communicating with such third parties in any manner regarding **the topic of plaintiff.** [Emphasis appears in original Petition for Review.] There is no justification whatsoever as to why defendant should be restrained from conversation with her former neighbors about other topics not relating to plaintiff. Under the current order she is restrained from having a completely innocent conversation with a former neighbor whom she happens to meet shopping. This was the limitation contained within the original May 8, 1986 temporary

restraining order. However, such limitation was deleted from the 1986 and 1987 permanent orders. Without such limitation, the injunction is constitutionally and equitably overbroad in the extreme. Social conversation on sundry topics is part of the freedom of association and free speech that is given constitutional protection.

It might be argued that the only way to prevent her from discussing plaintiff to such people is to prevent her from communicating at all. There is absolutely no reason to believe that such third parties would not be completely candid about the topic of conversation. That being the case, defendant is going to be deterred as effectively by the more limited order as the more complete order.

[25/26]

4. DEFENDANT HAS STANDING TO RAISE THE PRECEDING ISSUES NOTWITHSTANDING THAT THE OBJECTIONABLE FEATURES ALSO ARE CONTAINED WITHIN THE PRIOR INJUNCTION FROM WHICH SHE DID NOT APPEAL.

The objectionable features of the May 5, 1987 order also appeared in the May 22, 1986 order. Defendant has standing to complain in the instant appeal for two reasons.

First, plaintiff sought an amended injunction and thus acquiesced in the superseding of the prior injunction. Accordingly, defendant is entitled to presently challenge the amended injunction that issued from the Superior Court and to obtain complete relief from its objectionable features.

Alternatively, if the 1986 injunction is still deemed to be in effect, that will expire in May 1989 after which the instant injunction will persist for another year. The extension

of a restraint on freedom of association for an additional year comprises a sufficient interest to grant standing to defendant on the tendered issues.

CONCLUSION

For the foregoing reasons, the issues of law tendered herein are of considerable importance to the administration of justice in the California Courts in the oft-litigated, but seldom appealed, matter of harassment proceedings. Petitioner is entitled to have all injunctive relief relating to her contact with third parties struck from the order. Alternatively, peititioner is entitled to have the injunctive relief granted plaintiff cease by May 22, 1989 and/or to have it reduced to a proscription that she not be permitted to communicate with his friends or neighbors on the topic of plaintiff.

Dated: May 3, 1988

/s/ [Raymond C. Grueneich]
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Attorney for Petitioner

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution:

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution:

Article I, § 1 (Inalienable rights):

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

California Statutes:

Code of Civil Procedure:

CCP § 527.6:

(a) A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order, and an injunction prohibiting harassment as provided in this section.

(b) For the purposes of this section, 'harassment' is a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys or harasses the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff. 'Course of conduct' is a pattern of conduct composed of a series of acts over a period of time, however

short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of 'course of conduct.'

(c) Upon filing a petition for an injunction under this section, the plaintiff may obtain a temporary restraining order in accordance with subdivision (a) of Section 527. A temporary restraining order may be granted with or without notice upon an affidavit which, to the satisfaction of the court, shows reasonable proof of harassment of the plaintiff by the defendant, and that great or irreparable harm would result to the plaintiff. A temporary restraining order granted under this section shall remain in effect, at the court's discretion, for a period not to exceed 15 days, unless otherwise modified or terminated by the

court.

(d) Within 15 days of the filing of the petition, a hearing shall be held on the petition for the injunction. The defendant may file a response which explains, excuses, justifies or denies the alleged harassment. At the hearing, the judge shall receive such testimony as is relevant, and may make an independent inquiry. If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment. An injunction issued pursuant to this section shall have a duration of not more than three years. At any time within the three months before the expiration of the injunction, the plaintiff may apply for a renewal of the injunction by filing a new petition for an injunction under this section.

(e) Nothing in this section shall preclude either party from representation by private counsel or from appearing on his or her own behalf.

(f) Upon filing of a petition for an injunction under this section, the defendant shall be personally served with a copy of the petition, temporary restraining order, if any, and notice of hearing of the petition.

(g) The court shall order the plaintiff or the attorney for the plaintiff to deliver a copy of each temporary restraining order or injunction, or modification or termination thereof, granted under this section, by the close of the business day on which the order was granted, to the law enforcement agencies within the court's discretion as are requested by the plaintiff. Each appropriate law enforcement agency shall

make available information as to the existence and current status of these orders to law enforcement officers responding to the scene of reported harassment.

(h) The prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any.

(i) Any willful disobedience of any temporary restraining order or injunction granted under this section shall be punishable pursuant to Section 273.6 of the Penal Code.

(j) This section shall not apply to any action covered by Section 4399 [action for injunction against harassment, etc., in a proceeding to void or dissolve a marriage] or 7020 [action for injunction against harassment, etc., in a proceeding regarding child custody] of

the Civil Code, or by Chapter 4 (commencing with Section 1788) of the Civil Code [concerning debt collection practices]. Nothing in this secion shall preclude a plaintiff's right to utilize other existing civil remedies.

(k) The Judicial Council shall promulgate forms and instructions therefor, rules for service of process, scheduling of hearings, and any other matters required by this section. The petition and response forms shall be simple and concise.

[Bracketed material added to text of subdivision (j) by Petitioner to indicate nature of various statutory references.]

CCP § 1209:

(a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

2. A breach of the peace, boisterous condut, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding;

3. Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial

service;

4. Abuse of the process or proceedings of the court, or falsely pretending to act under authority of an order or process of the court;

5. Disobedience of any lawful judgment, order, or process of the court;

6. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court;

7. Unlawfully detaining a witness, or party to an action while going to, remaining at, or returning from the court where the action is on the calendar for trial;

8. Any other unlawful interference with the process or proceedings of a court;

9. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

10. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action, to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

11. Disobedience by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after

such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer.

(b) No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such manner as to actually interfere with its proceedings.

(c) Notwithstanding Section 1211 or any other provision of law, if an order of contempt is made affecting an attorney, his agent, investigator, or any person acting under the attorney's direction, in the preparation and conduct of any action or proceeding, the execution of any sentence shall be stayed pending the filing within three judicial days of a

petition for extraordinary relief testing the lawfulness of the court's order, the violation of which is the basis of the contempt, except for such conduct as may be proscribed by subdivision (b) of Section 6068 of the Business and Professions Code, relating to an attorney's duty to maintain respect due to the courts and judicial officers.

(d) Notwithstanding Section 1211 or any other provision of law, if an order of contempt is made affecting a public safety employee acting within the scope of employment for reason of the employee's failure to comply with a duly issued subpoena or subpoena dues tecum, the execution of any sentence shall be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the

lawfulness of the court's order, a violation of which is the basis for the contempt.

As used in this subdivision, "public safety employee" includes any peace officer, firefighter, paramedic, or any other employee of a public law enforcement agency whose duty is either to maintain official records or to analyze or present evidence for investigative or prosecutorial purposes.

CCP § 1218:

Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding one thousand dollars ($1,000), or he may be imprisoned not exceeding five days, or both.

No party, who is in contempt of a court order or judgment in a divorce or separate maintenance action, shall be permitted to enforce such order or judgment, by way of execution or otherwise, either in the same action or by way of a separate action, against the other party. This restriction shall not affect nor apply to the enforcement of child support orders.

Penal Code:

PC § 273.6:

(a) Any willful and knowing violation of any of the following court orders, when obtained pursuant to Section 4359, 4458, 4516, 7020, or 7021 of the Civil Code, Section 527.6 of the Code of Civil Procedure, or Chapter 4 (commencing with Section 540) of Title 7 of Part 2 of the Code of Civil Procedure, shall be a misdemeanor punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the county jail for not more than 6 months or by both such fine and imprisonment:

(1) An order enjoining any party from molesting, attacking, striking, threatening, sexually assaulting, battering, harassing, or disturbing the peace of the

other party, or other named family and household members.

(2) An order excluding one party from the family dwelling or from the dwelling of the other.

(3) An order enjoining a party from specified behavior which the court determined was necessary to effectuate the orders under subdivision (a) or (b).

(b) Any person who willfully and knowingly violates an order obtained pursuant to Section 527.6 of the Code of Civil Procedure shall be punishable as provided in subdivision (a). However, a person who has previously been convicted one or more times of violating an order obtained pursuant to Section 527.6 of the Code of Civil Procedure upon charges separately brought and tried, shall be imprisoned in the county jail for not

more than one year. Subject to the discretion of the court, the prosecution shall have the opportunity to present witnesses and relevant evidence at the time of the sentencing of a defendant pursuant to this subdivision.